No. 01-1757-CSY Title: Marion Reynolds Stogner, Petitioner
v.
California

Docketed: June 4, 2002 Court: Court of Appeal of California, First Appellate District

Entry	Date	Proceedings and Orders
	May 28 2002	Petition for writ of certiorari filed. (Response due July 4, 2002)
	Jul 10 2002	DISTRIBUTED for Conference of September 30, 2002
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	Sep 19 2002	Brief of respondent California in opposition filed.
	Oct 2 2002	REDISTRIBUTED for Conference of October 18, 2002
	Oct 18 2002	Reply brief of petitioner Marion Reynolds Stogner filed.
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	Dec 2 2002	Petition GRANTED. SET FOR ARGUMENT March 31, 2003.
		**********
	Jan 16 2003	Joint appendix filed.
	Jan 16 2003	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Jan 16 2003	Brief of petitioner Mario Reynolds Stogner filed.
	Feb 11 2003	Record filed.
	Feb 18 2003	Brief of respondent California filed.
	Feb 19 2003	CIRCULATED.
	Feb 19 2003	Brief amici curiae of American Psychological Association, et al. filed.
	Feb 19 2003	Brief amicus curiae of United States filed.
	Feb 21 2003	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 3 2003	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 20 2003	Reply brief of petitioner Mario Reynolds Stogner filed.
	Mar 31 2003	ARGUED.

Supreme Court, U.S.
FILED

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No. _____

In The Supreme Court

OF THE

United States

OCTOBER TERM, 2002

MARIO REYNOLDS STOGNER
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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78 pages

QUESTIONS PRESENTED (Rule 14.1 (a))

1. Did the California Legislature's abolition of the statute of limitations requirement, which historically comprised an element of the crimes charged, so as to charge Petitioner retroactively, violate the Ex Post Facto Clause?

2. Did the California Legislature's abolition of the statute of limitations arbitrarily retract a liberty interest the state had conferred on Petitioner?

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APPENDICES A-H

PETITION FOR WRIT OF CERTIORARI

Defendant Marion Reynolds Stogner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, Division 5 decided November 21, 2001, and which was denied review by the California Supreme Court on February 27, 2002.

OPINION BELOW (Rule 14.1(d))

The opinion of the California Court of Appeal, First Appellate District, which is the subject of this petition, was reported at 93 Cal.App.4th 1229 (2001). It appears in Appendix A. The California Supreme Court's order of February 27, 2002, denying discretionary review is attached as Appendix B. There is no written decision of the respondent Superior Court.

JURISDICTIONAL STATEMENT

The judgment of the California Court of Appeal to be reviewed was filed on November 21, 2001. App. A. The California Supreme Court denied discretionary review on February 27, 2002. App. B. This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a)

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Article I, section 10, clause 1, provides: "No State shall … pass any … Ex Post Facto Law…"

The United States Constitution, Amendment XIV, states: "No State shall … deprive any person of life, liberty, or property, with out due process of law…"

STATEMENT OF THE CASE

A. Procedural Background and History

In April 1998, a criminal complaint was filed charging Petitioner with two counts of a lewd act upon a child under California Penal Code section 288(a), alleged to have been committed 25 to 43 years earlier. (Appendix C.) Count one alleged lewd conduct upon Jane Doe I between January 1, 1955, and September 30, 1964. Count two alleged lewd conduct upon Jane Doe II between January 1, 1967, and September 27, 1973. The complaint acknowledged on its face that the limitations period for the offenses had expired, but alleged that the charges could be prosecuted pursuant to Penal Code section 803(g).[1]

Petitioner successfully demurred to the complaint on the ground that section 803(g) constituted an ex post facto law. The district attorney moved, unsuccessfully, in superior court to reinstate the complaint. On the State's appeal[2], the California Appeals Court reversed pursuant to the Supreme Court's holding in *People v. Frazer*, 21 Cal.4th 737 (1999), that Penal Code section 803(g) was not unconstitutional. *People v. Stogner*, A084772 (Cal.App. October 14, 1999). (Appendix D.)

This Court denied discretionary review. *Stogner v. California*, No. 99-8895 (October 2, 2000) (Appendix E.) However at the time of the denial, no California court had adjudicated Petitioner's 805.5 claim, nor had

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[1] Effective January 1, 1994, section 803(g) created a new one year limitations period for certain sex offenses, following a report to a law enforcement agency by a person of any age that he or she has been the victim of sexual misconduct while under the age of 18. It applies only to such causes of action already barred by Limitation.
2 The original demur raised the Statutory bar under Penal Code 805.5, but it was not litigated under the State's Appeal .

they evaluated his Constitutional claims in light of *Carmell v. Texas*, 529 U.S. 513 (2000).

The complaint was reinstated in superior court but subsequently dismissed on motion of the prosecutor when they filed an indictment. (Appendix F.) That indictment, filed March 14, 2001, again charges Petitioner with two counts of child molestation on two separate victims, Jane Doe I and Jane Doe II, alleging conduct between the dates of the alleged occurrence now ranging between 1955 and 1964 and between 1964 and 1973, respectively. Again the indictment alleged that the charges could be prosecuted under section 803(g).

Petitioner demurred, asserting that prosecution was barred, that no cause of action was stated, and that the court lacked jurisdiction. The demurrer raised ex post facto and due process violations, and alleged that section 805.5 barred application of section 803(g) to his case. (Appendix G.) Upon denial of the demurrer, petitioner filed a writ of prohibition. The Court of Appeals granted an Alternate Writ on the grounds that Petitioner had no other adequate remedy at law, but in its published opinion ultimately ruled against him. *See Stogner v. Superior Court*, 93 Cal.App.4th 1229 (2001) (App. A). A request for rehearing was denied. (Appendix H.) The California Supreme Court denied discretionary review. (App. B.)

B. Presentation Of The Federal Claims In State Court

Both of the federal claims presented in this petition were decided in an opinion on the merits which constituted a final judgment rendered by the highest state court, the California Supreme Court. Petitioner raised both of the federal claims in his appeal to the California Court of Appeal, specifying the federal nature

of the claims and relying on federal constitutional authority. Petitioner's Brief on the Merits at 20-32 [Ex Post Facto]; id. at 32-44 [Due Process]. Both claims were raised in Petitioner's petition for review in the California Supreme Court.

REASONS FOR GRANTING THE WRIT

(Rules 10, 14.1 (h))

This case presents important federal issues on which there are conflicts among federal and state courts.[3] These issues require resolution of interpretive differences of Constitutional dictates. Each side in this debate bases its reason on the opinions of this Court. Ultimately the Writ should be granted because it involves decisions that should no longer be postponed particularly in light of the increased litigation surrounding these matters.[4] This Writ requests this Court to determine whether rights, so ingrained in American jurisprudence as to be deemed irrevocable, can be retroactively revoked without violating the dictates of the United States Constitution.

California has created through its enactment of Statutes of Limitation, a tripartite right of absolute finality in Petitioner's favor. Where applicable[5] this Rule confers a substantive right upon the people, available to

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[3] *See e.g., People v. Frazer*, 21 Cal.4th 737, 757 (1999); *United States v. Knipp*, 963 F.2d 839, 843-44 (6th Cir. 1992); *United States v. Brechtel*, 997 F.2d 1108, 1113 & n.13 (5th Cir. 1993); *Christmas v. State*, 700 So.2d 262, 267-68 (Miss. 1997); *People v. District Court*, 834 P.2d 181, 200 (1992); *United States v. Morgan*, 845 F.Supp. 934, 943 (D. Conn. 1994), *aff'd on other grounds*, 51 F.3d 1105 (2nd Cir.), *cert. denied*, 516 U.S. 861 (1995); *State v. Crawley*, 96 Ohio App.3d 149, 155 (1994) *cert. denied* 115 S.Ct. 1999 (1995).

[4] Oregon has attempted to pass a similar statute, declared unconstitutional in *State v. Cookman* (1994) 127 Or.App. 283.

[5] California has created Limitations Statutes for most, but not all crimes.

all accused of any such wrongdoing by the State. It places an absolute limit on the State's ability to exercise its power to prosecute an action. It bars California's courts from exercising fundamental jurisdiction over the subject and the subject matter.

Although California created this rule, they now seek to upset it. California seeks to retroactively destroy this right and prosecute Petitioner Marion Reynolds Stogner, by Indictment for conduct barred from prosecution by the Statute of Limitations for over twenty-five years.

Based on California Section 803(g) [6], the State claims that the scourge of child molestation legislatively compels and constitutionally permits the forfeiture of Petitioner's right consistently ruled not subject to forfeiture. *See People v. Williams*, 21 Cal.4th 335 (1999); *People v. McGee*, 1 Cal.2d 611 (1934); *People v. Hoffman*, 132 Cal.App. 60 (1933); *cf People v. Frazer*, 21 Cal.4th 737 (1999). They have claimed the power to destroy a bar effectively in place since the State's foundation. They have rewritten their own rules[7] to retroactively cast out Petitioner from legislation designed through Section 805.5 to specifically reaffirm his particular right.

The State's claim of power to legislate retroactively is against the nature of criminal Statutes of Limitations.[8] In California the Statute is a basic and

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[7] In 1985 the California Legislature overhauled the entire Statute of Limitations scheme. For crimes barred by the limitations in effect prior to the enactment date of this legislation, the prior Statutes of Limitation were preserved and specifically exempted from the new legislation. The First District Court of Appeal ruled that this exemption was excepted by passage of Penal Code section 803(g) see Appendix A, Court's ruling Stogner written decision.

[8] *People v. Frazer* at 777 (Kennard , J. dissenting).

required element of the prosecution's case. The State circumvents their inability to overcome the law by altering it after the fact. The California Supreme and Appellate Courts, through their decisions in *Frazer* and *Stogner* have upheld these laws in a manner which retroactively vests jurisdiction in themselves, cedes power to the State to Prosecute, and forfeits Petitioner's rights. The States actions retroactively destroying this right violates the Ex Post Facto and Due Process Constitutions of the United States and California and all sense of fairness and finality contained therein.

For if California, through its legislative and judicial branches, is successful in depriving Petitioner of this right in this situation, then such right has effectively been destroyed for all persons the States may choose to prosecute, no matter how distant in time and memory the conduct may be. No matter how long the State has promised otherwise. No matter how final the rule has been expressed to be.

California has thus far been successful in forcing a forfeiture to that which all have agreed could not be forfeited. They have passed into law a rule of uncertainty that other states are adopting. It is therefore respectfully requested that the matter be fully and fairly adjudicated under established principles of due process, ex post facto, fairness and finality that have guided all citizens, the states, and the courts under the United States Constitution.

The history of Statutes of Limitation in California dates back to the state's foundation. In California, Statutes of Limitations were first enacted in 1851, the same year California became a state. They were later codified by the California legislature in 1872. *Frazer*, 21 Cal.4th at 793. Since their introduction, the availability of the Statute as a complete defense has been made abundantly clear. *People v. Miller*, 12 Cal.291 (1859)

(finding that time was material to any offense subject to limitation, and thus, "*Prima Facie*, the lapse of time is a good defense...." *Miller*, 12 Cal. at 295.

Over the centuries, the California Supreme Court has repeatedly endorsed this view of the statute declaring it to be a substantive right. *People v. Zamora*, 18 Cal. 3d 538, 547 (1976); *People v. Chadd* 28 Cal.3d 739, 756 (1981). Even *People v. Frazer*, 21 Cal.4th 737 (1999), agreed that statutes of limitation exists for the defendant's benefit, such statutes "seek to protect both the judicial system *and the defendant* from the burden of litigating claims after a specified time has passed, and after relevant evidence is presumably less reliable or no longer available." *Frazer* at 326 (emphasis added). In that same term the California Supreme Court recognized that "To allow defendant to lose the protection of the limitation accidentally could mean that persons could languish in prison under convictions that could not have occurred had they merely thought of the statute of limitations in time." *People v. Williams*, 21 Cal.4th 335, (1999) (upholding the jurisdictional aspect of Statutes of Limitation and declining to create a forfeiture rule).

A review of California case law shows the various stages at which this substantive right can be asserted. Its use as a multifaceted defense speaks to its inherent power.[9] It prevents or bars prosecution, judgment, and punishment. *People v. Miller*, 12 Cal. 291, 294 (1859)

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[9] Frazer, while finding that statutes of limitation are acts of legislative grace, never explored the nature of the right. Moreover while Frazer ruled on the meaning of section 803(g) in relationship to the new limitations period set up in the1985 legislation, it did not rule on claims based on the preexisting statutory rules upon which Petitioner relies under Penal Code Section 805.5. While the lower court ruled the new statutes applicable, it relied solely on *Frazer* to deny the Constitutional rights evem though Frazer never examined those rights in light of *Carmell v. Texas*, 529 U.S. 513 (2000).

("If all the allegations in the indictment be true, the party is not punishable.") It is never forfeited and even a plea of guilty does not waive it. *See People v. McGee*, 1 Cal.2d 611 (1934).

In California, the Statute of Limitations has consistently been ruled a material ingredient of an offense. *See People v. Crosby,* 58 Cal.2d 713 (1962). It defeats the power to prosecute in the first instance and serves as a defense to attack the charging document such as by way of demurrer. *See People v. Ayhens*, 85 Cal. 86 (1890) (approving such action under Penal Code Section 1004 because it is a legal bar to prosecution). Thus a cause of action shown to be outside the statutory period fails to "state a public offense and the defendant could not be prosecuted thereunder and no judgment of conviction could be based upon it." *People v. Hoffman.* (noting that this was the state of the law since *People v. Miller* 12 Cal. 291 (1859)); *People v. McGee*, 1 Cal.2d 611 (1934). Even where no demurrer is lodged, the prosecution can be defeated by special pretrial motion. *People v. Zamora*, 18 Cal.3d 538 (1976). At trial the matter is put at issue by a plea of not guilty and the State must bear the burden of proving that the Statute has not run in its case in chief. *See People v. James* 85 Cal. 86 (1890); *People v. Cunningham*, 99 Cal.App.2d 296 (1950).

This right then is more than "simply" jurisdictional and is greater than an affirmative defense. The failure by the State to prove this element can result in a directed verdict (*People v. Zamora*, 18 Cal.3d 538 (1976), or if submitted to the jury, to an acquittal. *People v. Doctor*, 257 Cal.App.2d 105 (1967). As the California Supreme Court recognized in *Serna v. Superior Court*, 40 Cal.3d 239 (1985), its bar is also "aimed as much at the *prevention of untimely prosecutions* as it is at the prevention of untimely convictions. (emphasis added). *Ex Parte Vice*, 5

Cal.App. 153, 155 (1907). Thus California has long recognized that the running of the Limitations period is a legal bar to prosecution. *People v. Asavis*, 27 Cal.App.2d 685 (1948).

Moreover it renders void a judgment, even based on a voluntary plea of guilty, if found in violation of its proscription. *See People v. Hoffman*, 132 Cal.App. 60 (1933) It is a basic attack on the courts ability to proceed in the first instance. *See People v. McGee*, 1 Cal.2d 611 (1934). Even where the court has already obtained jurisdiction over the subject and subject matter by way of a greater crime, a defendant does not cede jurisdiction to the court over a lesser crime absent a knowing and intelligent and express waiver specifically to that effect. *See People v. Cowan*, 14 Cal.4th 367 (1996). No court has ever maintained that California can exercise original jurisdiction in violation of the *McGee* rule. *See People v. Williams*, 21 Cal.4th 335 (1999); *cf. People v. Frazer*, 21 Cal.4th 737 (1999).

Petitioner asserts that the powerful nature of this right is best defined by the many decisions that have spoken of it. For it is not only in the varied ways that it can be raised, but its relationship to other constitutional protections that the importance of this right is illuminated.

The Courts have consistently explained Statute of Limitations by comparison and in relationship to established Constitutional rights and principles expressing the need for fairness and finality. So true are its dictates that it replaces the Fifth Amendment as a bar to self incrimination. *See Brown v. Walker*, 161 U.S. 591 (1896).

"Statute of limitation reflect a legislative construction of the speedy trial guarantee." *Serna v. Superior Court*, 40 Cal.3d 239 (1985). It serves as a

bridge between the Due Process Clause and Speedy Trial Right. *See United States v. Marion*, 404 U.S. 307 (1971). It stands in the way of overly stale prosecutions where the Speedy Trial Right does not apply. *Id.* Created to serve several purposes, (*see People v. Zamora*, 18 Cal.3d 538 (1976)), one of the primary ones is "to foreclose the potential for inaccuracy and unfairness that stale evidence and dull memories may occasion in an unduly delayed trial." *United States v. Levine*, 658 F.2d 113, 127 (3rd Cir. 1981) (italics omitted). Thus the Statute of Limitations has been used as a yardstick to measure post accusation delay for Speedy trial and due process purposes. *See Serna v. Superior Court*, 40 Cal.3d 239 (1985).

It also functions like double jeopardy in that it prevents prosecution in exactly the same way when raised. "The statement of former acquittal is no different in law than a statement that the statute of limitations had run on the crime, the result of both being that defendant could not thereafter be prosecuted for the offense whether originally guilty or not. The humane purpose designed by the legislature to be brought about by the statue of limitations affords immunity and protection to the citizen who thereby is free, and the public authorities who for three years failed to file a presentment for the alleged crime are thereafter precluded from pursuing him in a criminal prosecution." *People v. Hoffman*, 132 Cal.App. 60, 62-63 (1933); *People v. McGee*, 1 Cal.2d 611, 613 (1934); *United States v. Oppenheimer*, 242 U.S. 85 (1916) ("it cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the government's consent before a jury is empaneled....")

It shares the Fourth Amendments concern for security, preventing seizures of the person that are without reasonable or probable cause. *See People v. Hoffman*, 132 Cal.App. 60, 63-64 (1933) ("This being the nature of the proceeding of which defendant complains, it cannot be the law that to secure his right he must resort to the trouble, delay, and expense incident to appeal from the void judgment when by a motion made in the trial court it would be expected that his rights would be fully protected and his release from imprisonment promptly follows..") *See also Ex Parte Vice*, 5 Cal.App. 153, 157 (1907) (granting the habeas petition on the grounds that where the statute of limitations had run there existed no reasonable or probable cause to hold the petitioner.) [10]

It's import is such that it differs from many constitutional rights only in that, unlike them it cannot be forfeited by a failure to assert such as in the case of jeopardy. *See People v. Williams*, 21 Cal. 4th 335, 418 (1999). Unlike several Constitutional Rights it cannot be waived, except in the limited circumstances where the court has gained jurisdiction over a greater crime and thus can, at the defendant's pleasure only, entertain instructions or a plea agreement to an otherwise time barred lesser included instruction or plea agreement to a time barred lesser offense. *Id.*

It is this important right that a defendant can neither waive nor forfeit that the State of California by

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[10] Only *Ex Parte Blake*, 155 Cal. 586 (1909) declared, in dicta, that the Statute of Limitations was merely a matter of defense to be affirmatively plead which did not change the fundamental principle that when shown it resulted in acquittal. Regardless, any perceived controversy created by *Ex Parte Blake* was laid to rest when McGee overruled it.. *People v. McGee*, 1 Cal.2d 611, 613 (1934) Williams recently reaffirmed the jurisdictional rule. *People v. Williams*, 21 Cal.4th 335 (1999).

legislative fiat has taken from Petitioner by way of this retroactive legislation.

A. Issue One: Ex Post Facto

Petitioner asserts, by this Writ, that he is entitled to rely on a defense, complete since 1976, that the State of California is attempting to revoke retroactively. The States does this by redefining the elements of the offense, altering the rules of evidence, and thereby, enlarging the class of crimes there under, seeking punishment where none could be had. Petitioner asserts this violates the Calder categories under the Ex Post Facto Clause.

B. Issue Two: Due Process

The State seeks to forfeit a right, which the State's Highest Court continues to assert is substantive, belongs to Petitioner, and cannot be forfeited. Petitioner requests that this Court finds the State does so in violation of the Due Process Clause. The Fifth and Fourteenth Amendments of the United States Constitution guarantee the principle that no person will be deprived of life, liberty or property without due process of law. Taking the completed defense of the Statute of Limitations from Petitioner deprives him of a state guaranteed ability to regain his freedom. Having deprived him of the mechanism that compelled the courts to enjoin the State from infringing on his liberty any further, he must still face a trial that California and the United States Courts have agreed is conclusively and presumptively unfair. *United States v. Marion*, 404 U.S. 307, 322 (1971);. *People v. Zamora*, 18 Cal.3d 538 (1976).

ARGUMENT

A. Ex Post Facto

1. *Calder* Categories One and Two

California Penal Code section 803(g) deprives petitioner of a complete defense that arose under the statute of limitations in existence at the time of his alleged offenses. By law Petitioner has been entitled to an acquittal.[11] The deprivation contravenes the prohibition against ex post facto legislation because it eliminates a defense that negates an element the prosecution must prove to sustain a conviction. The defense also operates as a form of legislatively enacted excuse. [12] The abolishment of the statute of limitations

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[11] In California, a Statute of Limitations in a criminal case creates a substantive right, which renders a court wholly without jurisdiction once that right has ripened. The result of such ripening is that it destroys not only the remedy that might have been available if timely presented, but the underlying right or cause of action as well. *People v. McGee*, 1 Cal.2d 611 (1934); *Chambers v. Gallagher*, 177 Cal. 704, 708 (1918).("In criminal cases, the state, through its legislature, has declared that it will not prosecute crimes after the period has run, and hence has limited the power of the courts to proceed in the matter (citation omitted) . . . [W]nen the statute of limitation has run, the power to proceed in the case is gone." *McGee* at 614. The state has been divested of the right of action. *See also People v. Chadd* 28 Cal.3d 739, 756 (1981) (a violation of the statute of limitations described as "failing to state a public offense Thus the underlying cause of action was destroyed with the running of the statute. Section 803(g) therefore creates a new cause of action in violation of Calder category one.

[12] Black's Law Dictionary defines excuse as follows:

> **excuse.** ... **2.** *Criminal Law.* A defense that arises because the defendant is not blameworthy for having acted in a way that would otherwise be criminal. • The following defenses are the traditional excuses: duress, entrapment, infancy, insanity and involuntary intoxication.

Black's Law Dictionary 430 (7th ed. 1999.) Although the statute of limitations is not listed as a "traditional" excuse, it falls within the

therefore implicates both the first and second *Calder* categories.

Collins v. Youngblood, 497 U.S. 37 (1990) is often cited for the proposition that only certain defenses, those negating an element of the crime or operating as an excuse or justification for the crime charged, are encompassed within the first and second *Calder* categories. See footnote 3, supra. Although the *Collins* Court was not specific, one can assume that a defense that negates an element of the crime charged or justifies or excuses conduct implicates the first[13] and the second *Calder* categories. *See Collins* at 49-50. In the first instance, eliminating an element that the prosecution must prove to sustain a conviction effectively makes evidence that would result in acquittal now worthy of a conviction. Whether viewed as eliminating an element or a defense, 803(g) essentially enlarges or aggravates the crime by encompassing others, like Petitioner, who, prior to 803(g) had not been within its reach.

The Court does not elaborate what defenses were included in those labels and which ones were excluded. It is important to note that *Collins* was not a case about defenses, pretrial, trial or otherwise. *Collins* ruled that a statute allowing appeals courts to reform improper

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definition since a defendant is no longer blameworthy, that is he can no longer be prosecuted or punished, even when his conduct would otherwise be "criminal." Similarly the definition would include defendants who have been pardoned, granted amnesty, immunity, or have already been placed in jeopardy.

[13] Although in California, the statute of limitations is an element that the prosecution must prove to make its case, it also provides a form of immunity or amnesty if raised at the commencement of prosecution. Consider *State v. Keith*, 63 N.C. 140 (1869), a law revoking amnesty was held to be an unconstitutional ex post facto law as it made conduct that before the passing of the law was not criminal, criminal. *See In Re Bray*, 97 Cal.App.3d 506, 512 (1979) (discussing *State v. Keith*.)

sentences did not offend the ex post facto clause. *Collins*, 497 U.S. at 52. Defendant Youngblood had argued that he was entitled to a new trial under a law in existence at the time he was sentenced and that the new law had unconstitutionally removed his right to a new trial, a "substantial protection." *Id.* at 44. However the retroactive law simply did not violate any of the four *Calder* categories. It did not make "an action, done before the passing of the law, and which was innocent when done, criminal." It did not aggravate the crime "or make it greater than it was, when committed." It did not change the punishment, and inflict "a greater punishment, than the law annexed to the crime, when committed." Finally, it did not alter the legal rules of evidence, receiving less, "or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *Calder v. Bull*, 3 U.S. 386, 390 (1798); *see also Carmell v. Texas*, 529 U.S. 513, 539 (2000).[14]

In rendering its decision, the *Collins* Court rejected Youngblood's argument that the retroactive law had deprived him of a "substantial protection." *Collins v. Youngblood*, 497 U.S. 37, 44 (1990). The Court took note of the fact that this phrase had been linked with the ex post facto analysis in the past, *Id.* at 45-48, and decided that it should not be "read to adopt without explanation an undefined enlargement of the Ex Post Facto Clause. *Id.* at 47. The Court came to this conclusion in discussing, *inter alia*, *Kring v. Missouri*,

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[14] The *Collins* Court framed the result in the language of *Beazell v. Ohio*: "The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with a crime of any defense available according to law at the time when the act was committed." 269 U.S. 167, 169-70 (1925].

107 U.S. 221 (1883), a case the defendant Youngblood had relied on to argue his position. *Id.* at 47-50.

Kring was about "defenses" in the sense that the defendant argued he had a complete defense to the greater included offense because he had previously plead to the lesser included. The case was about the collateral consequences of a plea. Defendant Kring, originally charged with first-degree murder, argued that entering a plea of guilty to the lesser-included offense of murder in the second degree guaranteed him an acquittal of murder in the first degree under the law in effect at the time he committed his offense, *but that had been changed* by the time of his plea. *Kring v. State of Missouri*, 107 U.S. 221, 222 (1883) (emphasis added). In essence, Kring's position was that he had a complete defense to murder in the first-degree and the new law, an amendment to the state constitution, was unconstitutionally subjecting him to a charge of which he was acquitted. *Id.*

Kring's argument persuaded the Court at the time and it ruled in his favor. *Kring* at 235. In so doing, the Court stated that if a law in relation to its offenses or consequences, alters the situation of a defendant to his disadvantage, it was an ex post fact law. *Id.*

The *Collins* Court found this definition to exceed the scope of the ex post facto clause as originally intended and to be the cause of confusion in lower courts. *Collins* at 47, 50. The Court explained that the constitutional amendment at issue in *Kring*, did not violate any of the *Calder* categories and thus defendant did not have a "defense" in the traditional sense of the word:

> The "defense" available to Kring under earlier Missouri law was not one related to the definition of a crime, *but was based on the law regulating the effect of guilty pleas.* Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge; *it had changed its law respecting the effect of a guilty plea to a lesser included offense.*

Id. at 50 (emphasis added.)

Again, *Collins* was not a case about pretrial or trial defenses. Neither *Collins* nor *Kring* addressed whether the government could abolish an absolute defense that had arisen under legislative enactment at the time the crime was allegedly committed and before prosecution was initiated. Moreover *Kring* had nothing to do with a trial or the rights attendant to it. *Kring* concerned the collateral consequences of a plea. It was wrongly decided because it didn't fall within the *Calder* categories, not because *Calder* limits types of defenses.

This Court has never addressed whether and to what extent the government can remove a complete defense that succeeds in both negating an element of a crime in which the prosecution bears the burden of proof and operating as an excuse to a charged crime. The definition supplied in *Collins* was an illustration in response to defendant Kring's procedural posture as opposed to a strict limit on the *Calder* definitions.

Nonetheless, the California appeals court relied on the California Supreme Court's interpretation of *Collins* to deny Petitioner's claim that abolition of a complete defense, violates the Ex Post Facto Clause. *People v. Stogner*, No. A084772 (Cal.App., First Appellate District, October 14, 1999) *citing People v. Frazer*, 21

Cal.4th 737, 763 (1999). The California Supreme Court denied Petitioner's review.

The *Frazer* court waters down the *Collins* analysis such that the only defenses protected by the ban on ex post facto legislation are those that address the "'criminal quality of the act' as evidenced 'either by the legal definition of the offense or by the nature or amount of the punishment' at the time it occurs." *Frazer* at 760. The court reasoned that its conclusion was warranted by notice and reliance, the primary aim of the Ex Post Facto clause.[15] *Id.* It referred to *Collins* for reinforcement: "For this reason, Collins made clear that ex post facto protection extends only to 'defense[s]' bearing on the 'definition' and 'elements' of proscribed conduct, or involving 'excuse or justification' for its commission. *Frazer*, 21 Cal.4th 737, 760 (1999).

Although *Collins* made reference to defenses that are linked with the legal definition of the offense the decision in no way concludes that the government can

[15] Justices Harlan warned against citing notice and reliance as the single goal of the Ex Post Facto Clause: "Aside from problems of warning and specific intent, the policy of the prohibition against ex post facto legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct, even though the conduct could properly have been made criminal and even though the defendant who engaged in that conduct in the past believed he was doing wrong (as for instance when the penalty is increased retroactively on an existing crime) may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons." *James v. United States*, 366 U.S. 213, 247 fn.3 (1961). In declining to abandon the fourth *Calder* category, this Court echoed Justice Harlan: "... the absence of a reliance interest is not an argument in favor of abandoning the category itself. If it were, the same conclusion would follow for *Calder's* third category (increases in punishment), as there are few, if any, reliance interests in planning future criminal activities based on the expectation of less severe repercussions." *Carmell v. Texas*, 529 U.S. 513, 531 fn..21 (2000).

abolish a defense that negates an element of the crime the prosecution must prove.

The *Frazer* definition of defense simply cannot apply with precision to all the defenses inherent in a defendant's absolute right to mount a defense. The court's decision also brings to light an interesting anomaly in the law. That is, the distinction between proscribed conduct that defines a crime and the elements of an offense the prosecution must prove at trial to sustain a conviction.

For instance, in California identity is not part of the definition of the proscribed conduct of a crime (CALJIC No. 2.72) (6th ed. 1996) and yet it is an element that the prosecution must prove beyond a reasonable doubt. [CALJIC No. 2.91] (6th ed. 1996.) Likewise, statutes of limitations in California are not part of the definition of proscribed conduct but are an element of a relevant offense[16] in which the prosecution bears the burden of proof. *See People v. Le*, 82 Cal.App.4th 1352, 1360 (2000).

It would be unthinkable for the legislation to retroactively abolish the defense of mistaken identification, and yet that is the necessary conclusion after applying the *Frazer* interpretation of *Collins*.

This Court has recently underscored the thrust of the ex post facto prohibition: "There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of

[16] The term relevant refers to those offenses where time is a material ingredient in the sense that they are accompanied by a statute of limitations. *See* California Penal Code section 955 (West 1985.)

his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533 (2000.)

While California has made the molestation of children a crime, it has also made prosecution subject to the statute of limitations. When the time runs, the defendant holds a complete defense to prosecution. This defense negates an element of the crimes charged, proof of which is borne by the prosecution. This defense also operates as an excuse. There is no merit to an argument that purports to remove an absolute defense from a distinct group of defendants because of the status of the crime with which they are charged. Although the State of California is entitled to abolish the statute of limitations prospectively, it cannot do so retroactively.

2. *Calder* Category Three

By permitting a court to punish Petitioner, where previously he could not be punished, the third *Calder* category is violated as well. Whether this result is due to a bar on prosecution, a failure to state a cause of action, a lack of jurisdiction, or merely the "restoration" of a remedy makes little difference, construing the section as retroactive violates *Calder's* third category; for under the current regime, Petitioner may be punished for what was, previously, not punishable As applied to the Petitioner, Penal Code section 803(g) runs afoul of the third *Calder* category as well.

3. *Calder* Category Four

The new law that permits prosecution of Petitioner's time barred case effectively eliminates a material ingredient of the crime that the prosecution must prove in order to convict. Under Penal Code 803(g), the district attorney no longer needs to prove that the offenses occurred within the time period

necessary to satisfy the statute of limitations. Moreover the preexisting rules created an irrebuttable presumption that resulted in a dismissal. That same presumption is now withdrawn. However viewed, it is clear that this law "alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *See Calder v. Bull*, 3 U.S. 386, 390 (1798); *see also Carmell v. Texas*, 529 U.S. 513, 539 (2000.). It violates *Calder's* fourth category.

In *Carmell v. Texas*, 529 U.S. 513 (2000) this Court reaffirmed the existence of the fourth *Calder* category, (*Id.* at 537-38), and reestablished its position among those prohibitions which may *not* be evaded. *Collins v. Youngblood*, 497 U.S. 37, 46 (1990).

The California Supreme Court's decision in *People v. Frazer*, 21 Cal.4th 737 (1999), decided before *Carmell*, misconstrued *Collins'* to narrow the original four *Calder* categories to two: "Collins made clear that the two categories of impermissible retroactive legislation – redefining criminal conduct and increasing punishment – are exclusive." *Frazer* at 756.

Frazer, perhaps, could not have been expected to anticipate this Court's reaffirmation of the fourth *Calder* category in *Carmell*. However, when Petitioner appealed a denial of his demurrer to the indictment and raised *Carmell* as an applicable authority, the appellate court once again indicated it was bound by *Frazer* and chose not to take up the issue. Likewise, the California Supreme Court declined to decide Petitioner's claim.

Penal Code section 803(g) retroactively eliminated an element the prosecution had to prove. Such a change is precisely the type deemed fundamentally unfair in *Carmell*. "A law reducing the quantum of evidence required to convict an offender is as grossly unfair as,

say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof." *Carmell* 529 U.S. at 532.

Since *Carmell* was decided, the Court of Appeals for the Second District has recognized that *Frazer* may have indeed misread the United States Supreme Court's intent, noting that many appellate courts, including in California, and citing *Frazer* specifically, mistakenly believed that ex post facto "did not prohibit the application of new evidentiary rules...."*In re Melvin J.*, 81 Cal.App.4th 742, 757 fn 7 (2000.)

Carmell makes clear that the fourth Calder category remains an important restraint on the government's actions. Because an elimination of the statute of limitations through retroactive application of section 803(g) fundamentally alters the prosecution's burden necessary to convict, section 803(g) violates the Ex Post Facto Clause.

B. Due Process

Petitioner's due process rights are violated when his substantive rights are abridged, his completed defense annihilated, applicable presumptions removed and he is forced to face trial conclusively considered by the state and federal courts as unfair. *See United States v. Marion*, 404 U.S. 307 (1971); *People v. Zamora*, 18 Cal.3d 538 (1976).

Although none of the evidence has changed, 803(g) alters the applicable rules so that the long passage of time is insufficient for Petitioner to prevail. These facts no longer require a court to dismiss the matter or prevent it from passing further judgment or sentence on him. *See People v. McGee*, 1 Cal.2d 611

(1934); *People v. Hoffman*, 132 Cal.App. 60 (1934). In the same way he can no longer resists the powers of the prosecution on these facts. Penal Code Section 803(g) therefore removes from the defendant's arsenal the most complete and effective defense he can assert here. *Carmell v. Texas*, 529 U.S. 513 (2000); *see also Montana v. Egelhoff*, 518 U.S. 37 (1956).

Penal Code Section 803(g) subtlety, but effectively renders Petitioner's ability to marshal these facts, (even though not part of his burden), ineffective to gain an acquittal. It alters the rules after the fact for the sole purpose of improving the prosecutions chance of conviction. *Carmell v. Texas*, 529 U.S. 513 (2000).[17]. 803(g) does not in any way afford greater protection to Petitioner rather it increases his burden. Prior to section 803(g) the conclusive presumption could not be dispelled even by demonstrating a lack of prejudice to the defendant, *People v. Zamora*, 18 Cal.3d 538, 547 (1976). After section 803(g), Petitioner bears the burden of convincing the court that the passage of time has resulted in loss or impairment of evidence. While it has long been recognized that there is an increasing difficulty faced by a criminal defendant in obtaining reliable evidence, or any evidence at all, as time passes, *Zamora*, at 546, it bears noting that the passage of time also impairs his ability to show the significance and reliability of such destroyed evidence. Section 803(g)

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[17] In *Carmel v. Texas*, the High Court commented, "the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell* at 532. The notions of justice and fair play have long been associated with the due process clause. *See International Shoe Co. v. State of Washington*, 326 U.S. 310, 316. (1945)..

then represents the worst type of burden shifting[18] Rendering proof that these facts exist insufficient to bar prosecution, 803(g) makes a mockery out of the right to present evidence on an issue firmly rooted in American jurisprudence.[19]

Penal Code Section 803(g) has already and will continue to deprive Petitioner of Liberty and the substantive and procedural rights necessary to ensure that Liberty. It permits California to destroy a state-ensured binding guarantee[20] which has been in place

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[18] "While due process does not 'ba[r] States from making changes ... that have the *effect* of making it easier for the prosecution to obtain convictions,' *McMillan v. Pennsylvania*, 477 U.S. at 89, n.5 (1986)79 (emphasis added), an evidentiary rule whose sole *purpose* is to boost the State's likelihood of conviction distorts the adversary process. *Cf. Washington v. Texas*, 388 U.S. 14, 25 (1967) (Harlan, J., concurring in result); *Montana v. Egelhoff*, 518 U.S. 37, 68 (1996); (O'Connor, J., dissenting.)

[19] "The Clause does place limits upon restriction of the right to introduce evidence, but only where the restriction 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Crane v. Kentucky*, 476 U.S. 683, 687 (1986) quoting *California v. Trombetta, 467 US 479, 485*, (1984). "Our primary guide in determining whether the principle in questions is fundamental is, of course historical practice. *Montana v. Egelhoff*, 518 U.S. 37, 68 (1996); *see also Medina v. California*, 505 U.S. 437, 446 (1992)

[20] In California cases the passage of the statutory time has also been deemed akin to such an immunity. *People v. Snipe*, 25 Cal.App.3d 742 (1972), 747; *see People v. Huffman*, 132 Cal.App. 60, 63 (1933)), or an "amnesty." *In re Gustavo M.* 214 Cal.App.3d 1485 (1989), 1494. *See also In Re Bray*, 97 Cal.App.3d 506, 513 (1979) citing *State v. Keith* (1869) 63 N.C. 140 "(the ordinance was declared invalid because it deprived the prisoner of an immunity to which he had become entitled by statute. The amnesty act placed Civil War soldiers in the position as if the acts they committed were not criminal. The soldiers could not constitutionally be deprived of that benefit.")

since the State's foundation and which was well understood to have this meaning of finality under American criminal jurisprudence.

Historically it has been well understood by both federal and state courts that expired statutes of limitation serve as a complete and final bar to prosecution. In *Adams v. Woods*, 6 U.S. 336 (1805), Chief Justice Marshall noted that "not even treason can be prosecuted after a lapse of three years" *see also Pendergast v. United States*, 317 U.S. 412 (1942). This reason alone has justified federal and state courts to consistently rule that a person with a completed statute of limitation defense has no possibility of prosecution and thus has no need to rely on the Fifth Amendment privilege against self incrimination. *See Brown v. Walker*, 161 U.S. 591, 597 (1896); *Hale v. Henkel*, 201 U.S. 43 (1906) ("It is here that the law steps in and says that if the offense be outlawed or pardoned, or its criminality has been removed by statute, the amendment ceases to apply). California has expressed the same rule for well over a hundred years *Ex Parte Louis Cohen*, 104 Cal. 524 (1894).

Thus the Statute of Limitations must be viewed in this context. It expresses a rule of such finality that we have been assured that when the bar is in place we may not only speak freely, but even be compelled to speak. It is this understanding, deeply rooted in our traditions and consciousness that 803(g) seeks to wrench from its historical and constitutional context.

Despite these well recognized principles, the courts of California ignore them and all concerns for finality and plain meaning. On the one hand stating the right cannot be forfeited; the courts permit the state to forfeit it for Petitioner. *Cf. People v. Williams*, 21 Cal.4th

335 (1999); *People v. Le* 82 Cal.App.4th 1352, 1360 (2000); *People v. Frazer*, 21 Cal.4th 737 (1999). Calling it a substantive right, they refuse to give it substance. *Cf. People v. Zamora*, 18 Cal.3d 538 (1976); *People v. Frazer*, 21 Cal.4th 737 (1999). They insist on a lack of jurisdiction yet claim 803(g) creates jurisdiction retroactively. *Accord People v. McGee*, 1 Cal.2d 611 (1934) ; *People v. Cowan*, 14 Cal.4th 227 (1996); *People v. Williams*, 21 Cal.4th 335 (1999); *People v. Frazer*, 21 Cal.4th 737 (1999).

Although the legislature had enacted special legislation through Penal Code Section 805.5 preserving Petitioner's rights under prior law, the courts have ignored principles of finality expressed in doctrines such as stare decisis[21] and statutory interpretation. It is true that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1974); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 7111 (1974) ("A court should apply the law in effect at the time it renders its decision"). *People v. Haskins* 177 Cal.App.2d 84, 87 (1960) (Amendments may be construed as legislative reaffirmances of existing law). [22]

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[21] "(L)aw, to be obeyed, must be known; to be known, it must be fixed; to be fixed, what is decided to-day must be followed to-morrow; and *stare decisis et non quieta movere* is simply a sententious expression of these truths." Chamberlain, The Doctrine of Stare Decisis: Its Reasons and Its Extent, p. 26 (1885).

[22] Prior to *Stogner*, a long line of legal tradition had analyzed the old statute of limitations upon which Petitioner relies, finding that the ex post facto clauses barred the statutory extension of a statute of limitations once the original term had expired. *Lynch v. Superior Court*, 33 Cal.App.4th 1223, 1227 (1985); *People v. Eitzen*, 43 Cal.App.3d 253, 265-267(1974); *Sobiek v Superior Court*, 28 Cal.App.3d 846, 849-850 (1972); *Stogner* has interpreted this

They have ignored well established precedent that has expressed concern, dismay and even shock at prosecutions after prolonged delay.[23]

Thus by allowing 803(g) to operate retroactively, the Legislature and the courts break the solemn compact between government and citizen and destroys the dignity inherent therein. By enacting 803(g) the State has reneged on its agreement to its citizens and deprived Petitioner of a substantive right he has held for over twenty years. *See People v. Quartermain*, 16 Cal.4th 600, 618-620 (1997) (breach of a promise not to use defendant's statement to impeach was fundamentally unfair and denied him due process of law). Instead, 803(g)t allows the state to actively mislead with notice

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Statute contrary to its long history and Petitioner's position that prior judicial determination should prevail is but a reflection of the type of finality expressed in the *Teague v. Lane* 489 U.S. 288(1989) rule. The point being that whether or not it violates the Ex Post Facto Clause as it is understood today, the meaning of that Clause as it was understood in 1985 has been incorporated into the Statute of Limitations by the Legislature's passage of 805.5. Even if not violative of Ex Post Facto, taking this substantial right as it was defined in 1985 violates due process.

[23] *UnitedStates v. Irvine*, 98 U.S. 450 (1878) stated "It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lots, and when perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the pension office." *Barker v. Municipal Court*, 64 Cal.2d 806 (1966)."The thought of ordering defendant to trial on this charge after a lapse of twenty years shocks the imagination and conscience; In *Adams v. Wood*, 6 U.S. 336, 342 (1805), Chief Justice Marshall expressed the same concerns, stating it would be 'utterly repugnant to the genius of our laws' to allow such an action to lie 'at any distance of
time

that is unfair.[24] California has advised all citizens that they need not keep up their guard, nor need prepare or preserve defenses. The citizenry has been informed that finally, there is no need to fear an attack on our fundamental rights from our government, righteous or not.

Now California seeks to retract its word. It should not be permitted to do so. "Our Government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting) (overruled on other grounds). "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. *Id.* Having surrendered its right to prosecute by way of a statute of limitation, (*State v. Cookman*, 127 Or.App. 283 (1994) ; 873 P.2d 335; *State v. Dufort* (1992) 111 Or.App. 515, 519; 827 P.2d 192; *State v. Hodgson*, 108 Wash.2d 662 (1987), 667; 740 P.2d 848), the state may not renege on that promise years afterwards, when memories may have faded and evidence may have been destroyed." *Frazer, supra*, 21 Cal.4th at 780 (J. Kennard, dissenting).

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[24] The Due Process Clause also protects the interest in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statutes prospective application under the Clause may not suffice to warrant its retroactive application (citation): *Landgraf v. USI Film Products*, 511 U.S. 244, 266 "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope, *see Marks v. United States*, 430 U.S. 188, 191-192 (1997); *Rabe v. Washington*, 405 U.S. 313 (1972) (*per curiam*); *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964); *United States v. Lanier*, 520 U.S. 259 (1997).

There are due process limits on arbitrary governmental behavior in revoking its promises of protection such as when the government confers a substantive right and then arbitrarily revokes it. *(See, e.g.*, Raley v. Ohio (1959) 360 U.S. 423, 425-26 [3 L.Ed.2d 1344], where the U.S. Supreme Court held that when the defendants were assured of the right to remain silent by a legislative committee and then contempt for asserting it, this was "an indefensible sort of entrapment by the State.") While the Constitution does not guarantee defendants that they will be free from the prosecution after a fixed period of time, California, has conferred this very right via statute. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). "[T]he failure of the state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state."

If 803(g) is allowed to stand it will eliminate an important substantive right that destroys the cause of action according to both California and United States Supreme Court precedents. [25] It has destroyed a matter

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[25] *Chase Securities Corp v. Donaldson*, 325 U.S. 304 (1945), in construed the critical inquiry for due process analysis to be to determine how "the state court...construed the relationship between its limitation acts and the state law creating the asserted liability." *Chase*, 325 U.S. at 312, fn 8.

Where the right is statutorily created and is given a fixed period of time in which the remedy must be pursued, the United States Supreme Court has agreed the right itself is destroyed when the limitations period expires, and depriving an accused of this limitations defense by way of retroactive legislation does violate the due process clause. *William Danzer & Co. v. Gulf & Ship Island R., Col.*, 268 U.S. 633 (1925). *Chase* itself recognized this important distinction, noting *Danzer* and *Davis* stand for the proposition that retroactive legislation will result in a due process violation "where a statute in creating a liability also puts a period after its expiration...."*Chase* 325 U.S.at 312 fn. 8.

There are no common law crimes in California, all crimes are created by way of statute. Cal. Pen. Code, Section 6, *In re*

of substance rather than of form. *See Guaranty Trust Co. of New York*, 326 U.S. 99. Therefore, forcing Petitioner to forfeit the substantive right to raise this bar is in and of itself a violation of due process. *People v. McGee* 1 Cal.2d 611 (1934).

Moreover this issue is one civilized society has deemed fundamental as demonstrated by the long history reflecting its finality as well as the fact that no other jurisdiction has approved such a criminal statute "revival." The above notions of fair play that underpin the statute of limitations also underscore a more basic societal sense of fair play and decency (*Rochin v. California*, 342 U.S. 165, 172 (1952)) in not making promises only to break them retroactively years later.

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated this 28th day of May, 2002

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Brown, (1973) 9 Cal.3d 612, 624. California has similarly created a limitations period on certain classes of crimes, including Penal Code Section 288. Thus depriving Petitioner of his limitations defense violates due process.

APPENDIX A

Court of Appeal, First District, Division 5, California.

Marion Reynolds STOGNER, Petitioner,
v.
The SUPERIOR COURT of Contra Costa County,
Respondent;
The People, Real Party in Interest.

No. A094828.

Nov. 21, 2001.
Certified for Partial Publication. [FN*]

FN* Pursuant to California Rules of Court, rules 976(b) and 976.1, parts II, III and IV of this opinion are not certified for publication.

Review Denied Feb. 27, 2002.

Defendant demurred to indictment charging her with two counts of a lewd act upon a child committed 25 to 43 years earlier. The Superior Court, County of Contra Costa, No. 010398-6, Laurel Lindenbaum, J., overruled defendant's demurrer, allowing case to proceed to trial. Defendant sought relief. On alternative writ of mandate, the Court of Appeal, Simons, J., held that the statute providing a one year period for prosecution of child molestation charges following a report by a victim who had reached adulthood creates an exception to, and is not controlled by, statute that would bar prosecution by limiting time for prosecution of crime for which the statute of limitations expired before January 1, 1985.

Affirmed.

****39*1231** William W. Veale, Contra Costa County Alternate Defender, RobertoNájera, Contra Costa County Deputy Alternate Defender, Counsel for Petitioner.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Stan M. Helfman, Christopher J. Wei, Deputy Attorneys General, Counsel for Real Party in Interest.

SIMONS, J.

In this proceeding, we revisit the question whether petitioner Marion Reynolds Stogner may be prosecuted for child molestations allegedly committed between 1955 and 1973. In an earlier decision, we concluded that prosecution was not barred by ex post facto or due process principles. (*People v. Stogner* (Oct. 14, 1999, A084772) [nonpub. opn.].) Today we determine that prosecution is not precluded as a matter of statutory interpretation.

PROCEDURAL HISTORY

In April 1998, a criminal complaint was filed charging petitioner with two counts of a lewd act upon a child (Pen.Code, [FN1] § 288, subd. (a)) committed 25 to 43 years earlier. Count one alleged lewd conduct upon Jane Doe I between January 1, 1955, and September 30, 1964. Count two alleged lewd conduct upon Jane Doe II between January 1, 1967, and September 27, 1973. The complaint acknowledged on its face that the limitations period for the ***1232** offenses had expired, but alleged that the charges could be prosecuted pursuant to section 803, subdivision (g) (hereafter § 803(g)).

FN1. All undesignated section references are to the Penal Code.

Effective January 1, 1994, section 803(g) extended the limitations period for certain sex offenses

to one year following a report to a law enforcement agency by a person of any age that he or she has been the victim of sexual misconduct while under ****40** the age of 18. [FN2] Petitioner successfully demurred to the complaint on the ground that section 803(g) constitutes an ex post facto law, prohibited by the federal and state Constitutions. The district attorney then moved, unsuccessfully, in superior court to reinstate the complaint. On the People's appeal to this court, we reversed the trial court's order pursuant to the Supreme Court's holding in *People v. Frazer* (1999) 21 Cal.4th 737, 88 Cal.Rptr.2d 312, 982 P.2d 180, that section 803(g) is not unconstitutional as an ex post facto law. (*People v. Stogner, supra,* A084772.)

FN2. Subdivision (f) of section 803, enacted in 1989, provides a one year period for prosecution of child molestation charges following a report by a child. Section 803(g), in contrast, covers victims who have reached adulthood.

The complaint was reinstated in superior court but subsequently dismissed on motion of the prosecutor because the prosecutor had obtained a grand jury indictment. That indictment, filed March 14, 2001, again charges petitioner with two counts of child molestation (§ 288, subd. (a)) on two separate victims, Jane Doe I and Jane Doe II, allegedly committed between 1955 and 1964 and between 1964 and 1973, respectively. Again the indictment alleges that the charges may be prosecuted pursuant to section 803(g).

Petitioner demurred to the indictment, asserting, inter alia, that section 805.5 bars application of section 803(g) to this case. Petitioner now seeks relief from the trial court's order overruling his demurrer and allowing the case to proceed to trial. We issued an alternative writ of mandate and stayed the pending trial date. By issuing an alternative writ of mandate, we "necessarily

determined that there is no adequate remedy in the ordinary course of law and that [this] case is a proper one for the exercise of our original jurisdiction. [Citations.]" (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 773, 87 Cal.Rptr. 839, 471 P.2d 487, judg. vacated on other grounds (1971) 403 U.S. 915, 91 S.Ct. 2224, 29 L.Ed.2d 692.)

DISCUSSION

I. STATUTE OF LIMITATIONS

At the time the offenses were allegedly committed (from 1955 to 1973), the statute of limitations specified a three-year period for prosecution of ***1233** most felonies, including child molestation. (Former § 800, enacted by Stats. 1872; variously amended, as relevant here, from 1880 to 1972, repealed and replaced by § 800, Stats.1984, ch. 1270, § § 1, 2, p. 4335.) Consequently, under the law then in effect, prosecution of petitioner would have been barred after 1976. [FN3]

FN3. Effective January 1, 1981, the limitations period for a violation of section 288 was extended to five years. (Stats.1980, ch. 1307, § 2, p. 4422.) On January 1, 1982, it was extended to six years. (Stats.1981, ch. 1017,§ 1.5, p. 3926; Stats.1982, ch. 583, § 1, p. 2544.) Under the case law existing at the time, the limitations period could not constitutionally be extended once the initial period had expired. (*Sobiek v. Superior Court* (1972) 28 Cal.App.3d 846, 849-850, 106 Cal.Rptr. 516, now disapproved by *People v. Frazer, supra*, 21 Cal.4th at p. 765, 88 Cal.Rptr.2d 312, 982 P.2d 180.) Even if the extension had applied, of course, it would have been inconsequential; the limitations period would have expired as of 1979.

In 1984 the statutory scheme covering limitations

periods (§ 799 et seq.) was repealed and replaced by a new statutory scheme, which increased the limitations period for some felonies. (Stats.1984, ch. 1270, § 2, p. 4335 (the 1984 amendment).) The limitations period for child molestation, however, remained at six years from the date of commission. (§ 800.)

When the 1984 amendment was enacted, one of its provisions, former section 806, subdivision (c)(1), provided that the new ****41** law was not applicable to offenses for which prosecution was already time-barred. In 1986, former section 806, subdivision (c)(1), was amended and renumbered as section 805.5. (Stats.1986, ch. 248, § 161, p. 1264.) [FN4] As the California Law Revision Commission explained, "Subdivision (c)(1) limits retroactive application that would have the effect of lengthening the statute of limitation to reflect the constitutional *ex post facto* prohibition where the statute of limitation has already run on the operative date." (Recommendation Relating to Statutes of Limitation for Felonies (Jan.1984) 17 Cal. Law Revision Com. Rep. (1984) p. 324, italics in original.) Consequently, in the present case, because the previously-set limitations period applicable to petitioner's offenses had expired in 1976 (or perhaps 1979), the statutory scheme adopted in 1984 would not have permitted prosecution of them.

FN4. Section 805.5 provides: "(a) As used in this section, 'operative date' means January 1, 1985.[¶] (b) Except as provided in subdivision (c), this chapter applies to an offense that was committed before, on, or after the operative date. [¶] (c) *This chapter does not apply, and the law applicable before the operative date does apply, to an offense that was committed before the operative date, if:* [¶] (1) *Prosecution for the offense would be barred on the operative date by the limitation of time applicable before the operative date.* [¶] (2) Prosecution for the offense

was commenced before the operative date." (Italics added.)

Effective, January 1, 1994, section 803(g) extended the limitations period beyond six years for certain sexual offenses committed against minors so long as the prosecution commenced within one year following a report to ***1234** law enforcement authorities by the victim. The crime must have involved "substantial sexual conduct," and the victim's allegation must be corroborated by independent evidence. [FN5]

FN5. As originally enacted, section 803(g) provided in pertinent part: "Notwithstanding any other limitation of time described in this section, a criminal complaint may be filed within one year of the date of a report to a law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. This subdivision shall apply only if both of the following occur: [¶] (1) The limitation period specified in Section 800 or 801 has expired. [¶] (2) the crime involved substantial sexual conduct ... and there is independent evidence that clearly and convincingly corroborates the victim's allegation...." (Stats.1993, ch. 390, § 1, p. 2226.) In 1996 the statute was amended to change, among other things, the opening phrase of section 803(g) so that it now reads: "Notwithstanding any other limitation of time described in this *chapter* ...." (Italics added.)

In 1996, after several Court of Appeal decisions had declined to apply section 803(g) retroactively to cases where the applicable statute of limitations had already expired, the Legislature amended section 803(g) to declare that "[t]his subdivision applies to a cause of

action arising *before, on, or after January 1, 1994*, the effective date of this subdivision, and if the complaint is filed within the time period specified in this subdivision, *it shall revive any cause of action barred by Section 800 or 801.*" (Stats.1996, ch. 130, § 1 (the 1996 amendment) [Assem. Bill No.2014, adding § 803(g)(3)(A)], italics added.) [FN6] As the ****42** Legislative Counsel's digest explained, the 1996 amendment makes the one-year time limitation "apply to a cause of action arising before, on, or after the effective date ..., thereby reviving and extending already expired statute of limitations periods." (Legis. Counsel's Dig., Assem. Bill No.2014 (1995-1996 Reg. Sess.)) Thus, when the Legislature amended section 803(g) in 1996, it viewed the ex post facto issue far differently from the way it had in 1984, when the predecessor to section 805.5 was enacted: revival of an expired limitations period was not considered unconstitutional.

FN6. Before the 1996 amendment to section 803(g), the Supreme Court had granted review in five cases on the issue whether section 803(g) applied when the limitations period had already run. (*People v. Maloy* (S049313); *People v. King*, 59 Cal.Rptr.2d 669, 927 P.2d 1173 (1996); *People v. Sowers*, 51 Cal.Rptr.2d 83, 912 P.2d 534 (1996); *People v. Richard G.*, 45 Cal.Rptr.2d 206, 902 P.2d 224 (1995); *People v. Regules*, 46 Cal.Rptr.2d 749, 905 P.2d 418 (1995).) On April 24, 1997, the Supreme Court dismissed review in all those cases in light of the legislative amendment. (See *People v. Frazer, supra*, 21 Cal.4th at pp. 745-746, 88 Cal.Rptr.2d 312, 982 P.2d 180, fns. 5, 6, & 8.) The Attorney General's request for judicial notice of the orders dismissing review is unnecessary and accordingly denied.

Section 803(g) was further amended in 1997, but

the changes do not affect our analysis here. (Stats.1997, ch. 29, § 1.) It bears noting, however, that the amendment left intact the language allowing criminal charges to be filed in cases that were time-barred before 1994. (See generally *People v. Frazer*, *supra*, 21 Cal.4th at pp. 747-749, 88 Cal.Rptr.2d 312, 982 P.2d 180.)

***1235** The question before us is whether the Legislature's expressed intent to apply section 803(g) to offenses committed before January 1, 1994, and to "revive any cause of action barred by Section 800 or 801" operates to allow prosecution of petitioner for the offenses committed between 1955 and 1973. We conclude that it does.

We begin our analysis with *People v. Frazer*, in which the Supreme Court examined whether section 803(g) applies when the statute of limitations had expired before the effective date of section 803(g), January 1, 1994. In *Frazer*, the crimes were allegedly committed in 1984 and the statute of limitations had expired in 1990, but the parties did not dispute that section 803(g) applied. Nevertheless, the court discussed in some detail the application of the statute. We quote pertinent portions of the court's analysis: "At no point has section 803(g) restricted the amount of time that may pass between commission of the crime and commencement of the prosecution.... [¶] ... [¶][N]othing in section 803(g) provides that the crime must be committed, or that the limitations period in section 800 or 801 must expire, *after* January 1, 1994, in order for the extended one-year period to apply. The 1996 amendment left no doubt that section 803(g) applies even where the existing statute of limitations expired before January 1, 1994. [¶] ... [¶][T]he Legislature was highly familiar with the various Court of Appeal opinions filed in 1995 and 1996 that declined to apply section 803(g) where 'the previously applicable statute of

limitations had expired prior to January 1, 1994, (the effective date of Section 803(g)).' (Assem. Floor Analysis, Assem. Bill No.2014 (1995-1996 Reg. Sess.) June 21, 1996, p. 1.) The legislative record identified these Court of Appeal decisions by name and original published citation, and summarized the statutory and constitutional analysis each used to reach this conclusion. (*Id.* at pp. 1-2; Sen. Com. on Crim. Procedure,Analysis of Assem. Bill No.2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 7 9.)[¶] According to the legislative record, the primary reason for amending section 803(g) in 1996 was to repudiate these Court of Appeal decisions insofar as they had construed the statute in such a restrictive manner. The 1996 amendment sought to 'clarify,' through express 'retroactivity' and 'revival' provisions, that section 803(g) permitted charges to be filed within one year of the victim's report, even where prosecution of the crime was otherwise ****43** time-barred before January 1, 1994. (Sen. Com. on Crim. Procedure, Analysis of Assem. Bill No.2014 (1995- 1996 Reg. Sess.) June 3, 1996, pp. 5-7; Sen. Floor Analysis, Assem. Bill No.2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 2-4.)[¶] ... [¶] Thus, consistent with allegations in the complaint, section 803(g) serves as an exception to section 800 in the present case." (*People v. Frazer*, *supra*, 21 Cal.4th at pp. 752-753, 88 Cal.Rptr.2d 312, 982 P.2d 180, italics in original.)

The court then went on to consider the constitutionality of such a broad extension of the statute of limitations, and the court concluded that ***1236** section 803(g) is not an ex post facto law insofar as it applies to cases for which the statute of limitations had already expired. (*People v. Frazer*, *supra*, 21 Cal.4th at pp. 754-765, 88 Cal.Rptr.2d 312, 982 P.2d 180.)

[1] In the case before us, the statute of limitations had expired not only prior to the enactment of section

803(g) but even prior to the enactment of the entire chapter (ch. 2, tit.3, pt. 2) of the Penal Code in which section 803(g) sits. Petitioner argues that section 803(g) cannot be applied to him because section 805.5, subdivision (c)(1), makes the entire chapter inapplicable to crimes for which the statute of limitations expired before January 1, 1985. We must decide whether, properly interpreted, section 803(g) is an exception to section 805.5 or governed by it.

[2][3][4] In construing section 803(g), we are guided by familiar rules of statutory interpretation. "The primary duty of a court when interpreting a statute is to give effect to the intent of the Legislature, so as to effectuate the purpose of the law. [Citation.] To determine intent, courts turn first to the words themselves, giving them their ordinary and generally accepted meaning. [Citation.] If the language permits more than one reasonable interpretation, the court then looks to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, and the statutory scheme of which the statute is a part. [Citation.] ... Ultimately, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and it must avoid an interpretation leading to absurd consequences. [Citation.]" (*In re Luke W.* (2001) 88 Cal.App.4th 650, 655, 105 Cal.Rptr.2d 905.)

The opening phrase in section 803(g) seems designed to make it an exception to other provisions in the same chapter, including section 805.5: "Notwithstanding any other limitation of time described in this chapter ...." (§ 803(g)(1).) Petitioner, however, argues that the opening phrase of section 803(g) does not refer to section 805.5, because the latter does not describe a limitations period; it merely addresses the

applicability and operative date of the chapter. We decline to make such a fine distinction. Section 805.5, subdivision (c)(1), states that, as to offenses for which prosecution is time-barred by the limitations periods applicable before January 1, 1985, the previous limitations periods apply. (See fn. 4, *ante*.) Section 803(g), in turn, sets a one-year-from-date-of-report limitations period, "notwithstanding any other limitation of time." On its face, then, section 803(g) creates an exception to other limitations periods, even those limitations periods referred to in section 805.5 that had expired before January 1, 1985.

[5][6][7] Even if petitioner's interpretation of the initial clause in section 803(g) is reasonable, we believe that the Legislature intended to eliminate all constraints on the effect of section 803(g), except those contained in that ***1237** subdivision. Section 803 (g) ****44** was obviously designed to preclude child molesters from escaping punishment merely because the molestation was revealed after the victim became an adult and after the limitations period had elapsed. Certainly the Legislature was aware that children who are the victims of sex crimes often cannot recognize or effectively assert their victimization until they have reached adulthood. Moreover, victims of sex crimes may be more likely to delay reporting because they are afraid of reprisals or fearful that they will not be believed. The legislative purpose behind section 803(g) was to prevent sex offenders from reaping the benefits of their victim's immaturity and psychological trauma, and the legislative history plainly indicates that section 803(g) was intended to create an exception to the statutes of limitations. (See, e.g., Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 290 (1993-1994 Reg. Sess.) Apr. 13, 1993, pp. 2-3; Sen. Com. on Judiciary, Analysis of Assem. Bill No. 290 (1993-1994 Reg. Sess.) July 13, 1993, pp. 2-3.)

[8] Furthermore, the 1996 amendment to section 803(g) was intended to maximize the impact of the statute by ensuring that the prosecution's ability to file charges is "revive[d]" regardless of the passage of time between the commission of the crime and the commencement of prosecution, as long as the charges are filed within one year of the victim's report. "Sex crimes committed against children are the most heinous of offenses. Unfortunately, many don't bring the crime to the attention [of] law enforcement until many years later, when the statute of limitations has already expired. Children become double victims--first victimized by the perpetrator and again by the judicial system. This measure will *guarantee* them their day in court." (Assem. Com. on Pub. Safety, Analysis of Assem. Bill. No.2014 (1995-1996 Reg. Sess.) Apr. 9, 1996, p. 1 [according to the author], italics added.)

[9] The Legislature intended to override the Court of Appeal decisions that had refused to apply section 803(g) retroactively to crimes for which the statute of limitations had expired. (*People v. Frazer, supra*, 21 Cal.4th at pp. 752-753, 88 Cal.Rptr.2d 312, 982 P.2d 180.) There is no hint in the legislative history that less than complete retroactivity was intended, so long as charges were filed within one year of the victim's report. Yet petitioner's interpretation of sections 803(g) and 805.5 would accomplish a significant constraint. We reject it.

We recognize that in *Lynch v. Superior Court* (1995) 33 Cal.App.4th 1223, 1228, 39 Cal.Rptr.2d 414, disapproved on the ex post facto issue in *People v. Frazer, supra*, 21 Cal.4th at page 765, 88 Cal.Rptr.2d 312, 982 P.2d 180, the court took a contrary view and concluded that section 805.5, subdivision (c)(1), makes section 803(g) inapplicable to crimes for which the statute of limitations had expired as of January 1, 1985. However, the court's discussion was cursory and did not

***1238** address the precise points presented in the briefing before us. Furthermore, as the Supreme Court noted in *Frazer*, the Legislature's primary reason for amending section 803 (g) in 1996 was to repudiate certain Court of Appeal decisions that had declined to apply the statute retroactively. (*People v. Frazer, supra*, at p. 753, 88 Cal.Rptr.2d 312, 982 P.2d 180.) Among those decisions identified by the Legislature was *Lynch v. Superior Court, supra*, 33 Cal.App.4th 1223, 39 Cal.Rptr.2d 414, which was described as holding "that application of Section 803(g) ... violated constitutional ex post facto principles, and is prohibited as a matter of statutory construction in light of Penal Code Section 805.5...." (Assem. Com. on Pub. Safety, Analysis of Assem. Bill No.2014 (1995-1996 Reg. Sess.) Apr. 9, 1996, p. 2.) The language of the 1996 amendment to section 803(g), added as a ****45** response to and a repudiation of *Lynch*, providing that the subdivision applies even to offenses committed before January 1, 1994, and that the subdivision "shall revive any cause of action barred by Section 800 or 801" (§ 803(g)(3)(A)), could not be more explicit in reflecting the Legislature's intent to override the existing limitations periods for those offenses for which prosecution is time-barred.

In light of the evident legislative purpose, we construe the beginning phrase of section 803(g)--"[n]otwithstanding any other limitation of time described in this chapter"--to reflect an intent to supersede section 805.5 insofar as it affects limitations periods. Although we are cognizant of the principle that statutes should be read in harmony with each other whenever possible, we cannot accept petitioner's argument that section 803(g) should be read as subordinate to section 805.5. In our view, section 803(g) creates an exception to section 805.5 and is not controlled by it.

Finally, interpreting the relationship between sections 803(g) and 805.5 as petitioner suggests would

serve no apparent legislative purpose. As noted above, when originally enacted as part of a package of statutes, section 805.5 served the Legislature's goal of avoiding a conflict with the ex post facto clause by precluding prosecution of any offense for which the statutory period had run. With the enactment of section 803(g), however, the Legislature's goal changed, and section 805.5 played no role in the efforts to extend the limitations periods and revive molestation charges that would otherwise be time-barred. [FN7]

> FN7. The operative date of section 805.5 is January 1, 1985. When enacted, section 805.5 applied to a chapter that did not include section 803(g). Given the specificity of section 805.5 regarding its operative date, we read it as applying to the chapter enacted in conjunction with it and not to subsequent legislation.

In any event, even under petitioner's view that section 805.5 governs the application of section 803(g), section 805.5 would not affect all prosecutions ***1239** equally. Section 805.5 would bar prosecution of any molestation that was already time-barred as of January 1, 1985, i.e., one that was committed prior to January 1, 1979, more than six years before the chapter's operative date. But section 805.5 would have no effect on offenses committedafter January 1, 1979; the charges would be revived by section 803(g). Thus, under petitioner's interpretation, a complaint filed in 1994, after section 803(g) took effect, could have properly charged an offense committed in 1979, a then 15 year old offense, but not one committed in 1978. [FN8] A complaint filed in 2001 could likewise charge a molestation which occurred in 1979, now 22 years after the fact. In 2009, a 30 year old offense could be prosecuted. Petitioner's interpretation of section 805.5 would impose a limitations period based simply on the date of the occurrence of the offense--a factor unrelated

to the traditional reasons for limitations periods.

> FN8. This is true because a three-year statute of limitations applied to molestation offenses committed in 1978 and 1979. That period was lengthened to five years, effective January 1, 1981, and six years, effective January 1, 1982. (See fn. 3, *ante*.) The 1978 offense was, therefore, time-barred before the effective date of section 805.5, while the 1979 offense was not.

In crafting an appropriate length of a limitations period, the Legislature balances competing interests. On the one hand, a statute of limitations protects an accused from the consequences of charges grown stale with age: unreliable memories, dead or missing witnesses, and lost or contaminated physical evidence. (Recommendation Relating to Statutes of Limitation for Felonies (Jan.1984) 17 Cal. Law Revision Com. Rep., *supra*, p. 308.) At ****46** the same time, the Legislature also considers the nature and seriousness of the offense. [FN9] Section 803(g) reflects a reasonable legislative concern for certain crimes where delayed reporting is common and serves to revive otherwise time-barred charges for a brief period after the victim's report is made. We can discern no logical reason why the Legislature would retain a limitations period based not on the age of the offense, but on its date of occurrence. We do not believe the Legislature intended this result, and we refuse to impose it. [FN10]

> FN9. Some offenses may be prosecuted at any time without regard to a limitations period. (§ 799.) Other offenses must be prosecuted within the prescribed limitations period, but the limitations period does not commence to run until the offense was discovered. (§ 803, subds.(c) & (e).)

FN10. In light of our conclusion, we summarily reject petitioner's argument that section 803(g) revives only causes of action "barred by Section 800 or 801" and that this language must refer only to the version of sections 800 and 801 in effect when section 803(g) took effect (Jan. 1, 1994), not the version that had been repealed when the predecessor to section 805.5 took effect (Jan. 1, 1985). This argument presumes that section 805.5, subdivision (c)(1), controls,but we have rejected that premise. In any event, the language of section 803(g) upon which petitioner relies seems to have been included in the statute solely to clarify that the one-year-from-date-of-report limitations period extends the time for prosecution and does not cut short the longer periods provided in sections 800 and 801.

We recognize, of course, that the effect of our holding today is to make possible the prosecution of offenses reaching far back in time. We observe, ***1240** however, that the express requirement in section 803(g) for a greater quantum of evidence provides some protection against the erosion of memories and evidence caused by the passage of time.

II.-IV. [FN**]

FN** See footnote *, *ante*.

DISPOSITION

The alternative writ is discharged, the stay is lifted, and the petition is denied.

We concur: JONES, P.J. and STEVENS, J.

APPENDIX B

Court of Appeal, First Appellate District, Division
Five – No. A094828
S103297

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARION REYNOLDS STOGNER, Petitioner,

v.

SUPERIOR COURT OF CONTRA COSTA COUNTY, Respondent;

THE PEOPLE, Real Party in Interest

Petition for review DENIED.

Supreme Court
FILED
February 27, 2002
Frederick K. Olrich, Clerk
Deputy

GEORGE
Chief Justice

APPENDIX C

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF CONTRA COSTA
DELTA JUDICIAL DISTRICT

THE PEOPLE OF THE STATE CALIFORNIA, — NO. 110032-0 OF DA NO. X 98 000097-6

VS.

COMPLAINT – FELONY

MARION REYNOLDS STOGNER, DEFENDANT./ — 01) PC 288(a) 02) PC 288(a)

The undersigned states, on information and belief, that MARION REYNOLDS STOGNER, Defendant, did commit a felony, to wit:

Violation of PENAL CODE SECTION 288(a) (LEWD AND LASCIVIOUS ACT UPON CHILD), committed as follows, to wit:

On or about January 1, 1955 through September 30, 1964, at Antioch, in Contra Costa County, the Defendant, MARION REYNOLDS STOGNER, did willfully, unlawfully, lewdly and feloniously commit a lewd and lascivious act upon and with the body of Jane DOE I, who was a child under the age of fourteen years, with the intent to arouse, appeal to and gratify the lust, passion and sexual desires of Jane DOE I and of the Defendant, MARION REYNOLDS STOGNER.

STATUTE OF LIMITATION (PC 803)

It is further alleged, that the crime alleged in Count One above, can be prosecuted pursuant to Penal Code section 803(g), in that:

On February 19, 1998, Jane Doe I reported to a law enforcement agency that she, while under the age of 18 years, was the victim of sexual crimes as specified in Penal Code section 803(g), to wit, 288;

The limitation period specified in Sections 800 and 801 has expired as to the charged crime;

The crime involved substantial sexual conduct as defined in Section 1203.066(b), to wit, oral copulation;

There is independent evidence that clearly and convincingly corroborates the allegations in Count One, to wit, the statement of another victim (Jane DOE II) alleging that she is a victim of similar crimes perpetrated by defendant as alleged in Count Two, below.

COUNT TWO:

The undersigned further states, on information and belief, that MARION REYNOLDS STOGNER, Defendant, did commit a felony, to wit:

Violation of PENAL CODE SECTION 288(a) (LEWD AND LASCIVIOUS ACT UPON CHILD), committed as follows, to wit:

On or about January 1, 1967 through September 27, 1973, at Antioch, in Contra Costa County, the Defendant, MARION REYNOLDS STOGNER, did willfully, unlawfully,

lewdly and feloniously commit a lewd and lascivious act upon and with the body of Jane DOE II, who was a child under the age of fourteen years, with the intent to arouse, appeal to and gratify the lust, passion and sexual desires of Jane DOE II and of the Defendant, MARION REYNOLDS STOGNER.

STATUTE OF LIMINATIONS (PC 803)

It is further alleged, that the crime alleged in Count One above, can be prosecuted pursuant to Penal Code section 803(g), in that:

On February 19, 1998, Jane Doe II reported to a law enforcement agency that she, while under the age of 18 years, was the victim of sexual crimes as specified in Penal Code section 803(g), to wit, 288;

The limitation period specified in Sections 800 and 801 has expired as to the charged crime;

The crime involved substantial sexual conduct as defined in Section 1203.066(b), to wit, oral copulation;

There is independent evidence that clearly and convincingly corroborates the allegations in Count One, to wit, the statement of another victim (Jane DOE II) alleging that she is a victim of similar crimes perpetrated by defendant as alleged in Count One, above.

COMPLAINANT REQUESTS THAT DEFENDANT(S) BE DEALT WITH ACCORDING TO LAW. I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: April 17, 1998 AT MARTINEZ, CALIFORNIA

C. FORSYTH

COMPLAINANT

BRIAN S. BAKER/dh
DEPUTY DISTRICT ATTORNEY
CONTRA COSTA COUNTY SHERIFF

APPENDIX D

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FIVE

THE PEOPLE,
Plaintiff and Appellant A084772

v.

MARION REYNOLDS STOGNER,
Defendant and Respondent. (Contra Costa County Super. Ct. No. 9816224)

The sole question raised in this People's appeal is whether the Legislature's effort to revive the prosecution of certain sex offenses for which the limitations period has already expired (Pen. Code,§ 803, subd. (g)) is unconstitutional as an ex post facto law. In accordance with the recent decision in People v. Frazer (1999) 21 Cal.4th 737, we reverse the trial court's order denying the prosecution's motion to reinstate the complaint.

PROCEDURAL HISTORY

In April 1998, a criminal complaint was filed charging defendant with two counts of a lewd act upon a child (Pen. Code, § 288, subd. (a)) committed 25 to 43 years earlier. Count I alleged lewd conduct upon Jane Doe I between January 1, 1955, and September 30, 1964. Count II alleged lewd conduct upon Jane Doe II between January 1, 1967, and September 27, 1973. The complaint acknowledged on its face that the limitations period for the offenses had expired, but the complaint alleged that the charges could be prosecuted pursuant to Penal Code section 803, subdivision (g) (hereafter section 803(g)).

Section 803(g), enacted in 1994, extends the limitations period for certain sex offenses to one year following a report to a law enforcement agency by a person of any age that he or she has been the victim of "substantial" sexual misconduct while under the age of 18.26 Defendant demurred to the complaint on the ground that section 803(g) constitutes an ex post facto law prohibited by the federal and state Constitutions. After the magistrate sustained the demurrer, the district attorney moved in superior court to reinstate the complaint. The motion was denied, and the People now appeal from the order denying that motion.

DISCUSSION

Our Supreme Court has rejected the argument that section 803(g) constitutes an impermissible ex post facto law. In the court's words: "Statutes regulating the time at which a future criminal prosecution may be filed do not implicate the manner in which criminal conduct is defined and punished at the time it occurs—the sole concern of the ex post facto clause." (People f. Frazer, supra, 21 Cal.4th at p. 763.) Moreover, the court further concluded that section 803(g) is not unconstitutional in the abstract as a violation of substantive or

---

26 Section 803(g) presently provides in pertinent part as follows: "(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. [¶] (2) This subdivision applies only if both the following occur: [¶] (A) The limitation period specified in Section 800 or 801 has expired. [¶] (B) The crime involved substantial sexual conduct...and there is independent evidence that clearly and convincingly corroborates the victim's allegation.....(3)(A) This subdivision applies to a cause of action arising before, on, or after January 1, 1994,...and it shall revive any cause of action barred by Section 800 or 801 if any of the following occurred or occurs:...(ii) The complaint or indictment is or was filed subsequent to January 1, 1997, and it is or was filed within the time period specified within this subdivision."

procedural due process principles under the federal and state Constitutions. (21 Cal.4th at pp. 765-775.)

Because we are bound by that ruling, we are compelled to reverse the trial court's order.27 We observe, however, that the Supreme Court in Frazer left open the possibility of a due process claim in an appropriate case. The courts have long recognized that unreasonable delay between the time the offense is committed and an accusatory pleading is filed may violate a defendant's rights to a fair trial and due process of law under the federal and state Constitutions. (People v. Morris (1988) 46 Cal.3d 1, disapproved on other grounds in In re Sassounian (1995) 9 Cal.4th 535, 543, fn. 5, & 545, fn. 6, & cases cited in Morris at p. 37.) The Frazer court concluded that a determination of unconstitutional preaccusation delay can be made only upon consideration of the particular circumstances in an individual case. (Frazer, supra, 21, Cal.4th at pp. 774-775.) The case before it having arisen on demurrer, the court found the defendant's claim not ripe for adjudication and declined to decide whether the 12-year lapse between the alleged commission of the offense and the filing of the criminal complaint violated the defendant's procedural due process rights..(Id. At p. 775.)

In the present case, too, defendant's constitutional claim was addressed below on demurrer, and we have no information about the particular circumstances of the case. Whether precomplaint delay is unjustified and prejudicial is a question of fact for the trial court. (People v. Dunn-Gonzalez (1996) 47 Cal.App.4th 899, 911-912.) Accordingly, we will leave it to the trial court to examine in an appropriate proceeding the reasons for the 25-to-43-year delay and the resulting damage to defendant's ability to refute the charges.

---

27 In his respondent's brief on appeal, defendant raises for the first time a new constitutional argument that section 803(g) violates the separation of powers doctrine. Because that issue was not raised either by defendant below or by the People on appeal, we decline to address the issue.

DISPOSITION

The order denying the motion to reinstate the complaint is reversed.

_____

Jones, P.J.

We concur:

_____

Haning, J.

_____

Stevens, J.

A084772

APPENDIX E

Supreme Court of the United States

Marion Reynolds STOGNER, petitioner,
v.
CALIFORNIA.

No. 99-8895.

Oct. 2, 2000.

Petition for writ of certiorari to the Court of Appeal of California, First Appellate District, denied.

APPENDIX F

GARY T. YANCEY, District Attorney
CONTRA COSTA COUNTY
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Telephone: (925) 646-4500

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THECOUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE OF CALIFORNIA,

v.

No.
DA NO. X 98 000097-6
INDICTMENT

MARION REYNOLDS STOGNER,
DEFENDANT./

PC 288(a)
PC 288(a)

The Grand Jury of the County of Contra Costa hereby accuses
MARION REYNOLDS STOGNER, defendant, of the crime of a felony, a violation of PENAL CODE SECTION 288 (LEWD ACT UPON CHILD UNDER AGE 14), committed as follows:

On or about January 1, 1955 through September 30, 1964, at Antioch, in Contra Costa County, the Defendant, MARION REYNOLDS STOGNER, did willfully, lewdly, and unlawfully commit a lewd and lascivious act upon and with the body of Jane Doe I, a child who was under the age of fourteen

years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the Defendant and Jane Doe I.

JURISDICTIONAL ALLEGATION
STATUTE OF LIMITATIONS
MINOR SEXUAL ASSAULT CRIME

It is further alleged, that the crime alleged in Count One above, can be prosecuted pursuant to Penal Code section 803(g), in that:

On February 19, 1998, Jane Doe I reported to a law enforcement Agency that she, while under the age of 14 years, was the victim of sexual crimes as specified in Penal Code Section as specified in Penal Code Section 803(g) to wit, 288;

The limitation period specified in Sections 800 and 801 has expired as to the charged crime;

The crime involved substantial sexual conduct as defined in Section 1203.066(b), to wit, oral copulation and vaginal penetration;

There is independent evidence that clearly and convincingly corroborates the allegations in Count One, to wit, the statement of another victim (Jane Doe II) alleging that she is a victim of similar crimes perpetrated by defendant as alleged in Count Two below.

COUNT TWO:

The Grand Jury of the County of Contra Costa further accuses MARION REYNOLDS STOGNER, Defendant, of the crime of felony, a Violation of PENAL CODE SECTION 288 (LEWD ACT UPON CHILD UNDER AGE 14), committed as follows:

On or about January 1, 1964 through September 27, 1973, at Antioch, in Contra Costa County, the Defendant,

MARION REYNOLDS STOGNER, did willfully, lewdly, and unlawfully commit a lewd and lascivious act upon and with the body of Jane Done II, a child who was under the age of fourteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the Defendant and Jane Doe II.

JURISDICTIONAL ALLEGATION
STATUTE OF LIMITATIONS
MINOR SEXUAL ASSAULT CRIME

It is further alleged, that the crime alleged in Count Two above, can be prosecuted pursuant to Penal Code Section 803(g), in that:

On February 18, 1998, Jane Doe II reported to a law enforcement agency that she, while under the age of 14 years, was the victim of sexual crimes as specified in Penal Code Section 803(g), to wit, 288;

The limitation period specified in Sections 800 and 801 has expired as to the charged crime;

The crime involved substantial sexual conduct as defined in Section 1203.066(b), to wit, sodomy, vaginal penetration, and oral copulation;

There is independent evidence that clearly and convincingly corroborates the allegations in Count Two, to wit, the statement of another victim (Jane Doe I) alleging that she is a victim of similar crimes perpetrated by defendant as alleged in Count One, above.

GARY T. YANCEY
District Attorney

Dated: 3/13/01

JOHN C. COPE

at Martinez, California

Deputy District Attorney

* * * * *

A TRUE BILL

Dated: 3/13/01

at Martinez, California

Foreman of the Grand Jury of the County of Contra Costa, State of California

* * * * *

Names of witnesses examined before the Grand Jury on finding the foregoing indictment:

1) MARGARET VAUGHN
2) CONNIE KILDARE
3) DETECTIVE CHRIS FORSYTH

APPENDIX G

SUPERIOR COURT OF CALIFORNIA,
MARTINEZ

DA: WILSTED CRIMINAL DEPT CALENDAR
PO: ANDERSSON 04/19//2001 8:30
04/16/2001

JUDGE L. LINDENBAUM DEPARTMENT 031
16:16

CLERK CHERTKOW/MOYER
REPORTER: D. EASTRIDGE

NBR---DEFENDANT---CASE/DEFN---ROC---
ATTORNEY-TIME

---

034 STOGNER, MARION REYNOLDS 010398-6 01
MOTION 1:30

DOB: 06/13/1928 CHARGES: +PC 288(a)
DEMUR-RENEWED/TB

CUSTODIAL STATUS: OR

SET 05/01/01

APPENDIX H

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 5

MARION REYNOLDS STOGNER,
Petitioner,

v.

THE SUPERIOR COURT
OF CONTRA COSTA COUNTY
Respondent;
THE PEOPLE,
Real Party in Interest

A094828
Contra Costa County No. 0103986

BY THE COURT:

The petition for rehearing is denied.

Date: December 17, 2001 JONES, P.J. P.J.

COPY

No. 01-1757

Supreme Court, U.S.
FILED
SEP 19 2002

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

MARION R. STOGNER, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF PROHIBITION TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

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QUESTIONS PRESENTED

1. Did the California Supreme Court properly find that the California Legislature's revival of a time-barred criminal case, by a retroactive law enacted after the expiration of the previously-applicable statute of limitations, does not violate the Ex Post Facto Clause?

2. Did the California Supreme Court properly find that the California Legislature's revival of a time-barred criminal case, by a retroactive law enacted after the expiration of the statute of limitations, does not violate the Due Process Clause?

In *Youngblood*, this Court addressed a sex offender's claim that a new statute permitting an appellate court to reform an otherwise improper verdict, rather than requiring a new trial, could not be applied retroactively. The Court of Appeals had held he was entitled to relief, relying on *Thompson v. Utah*, 170 U.S. 343 (1898) in which this Court had held that procedural statutes cannot be retroactively applied unless they "'leave untouched all the substantial protections with which existing law surrounds the person accused of crime.'" *Id.* at 352, *quoted in Youngblood*, 497 U.S. at 40.

In reversing the Court of Appeals, this Court endorsed its earlier formulation of the law in *Calder v. Bull*, 3 U.S. 386, and *Beazell v. Ohio*, 269 U.S. 167 (1925), as "faithful to our best knowledge of the original understanding" of the Ex Post Facto Clause. *Youngblood*, 497 U.S. at 43.

In *Youngblood*, this Court overruled two prior decisions that misconstrued the scope of the ex post facto clause. In *Kring v. Missouri*, 107 U.S. 221 (1883), the Court had stated that the *Calder* list was non-exclusive, and it defined an ex post facto law to include, also, one that "in relation to the offence or its consequences, alters the situation of a party to his disadvantage." In *Thompson v. Utah*, 170 U.S. 343, the Court had stated that a law was ex post facto if, after commission of the crime, it deprived a defendant of a "substantial right involved in his liberty."

In *Kring*, the defendant had pleaded guilty to second-degree murder, pursuant to a plea agreement. After reversal of his conviction, because of an unlawful sentence, the state tried and convicted him of first-degree murder. At the time the crime was committed, Missouri law had provided that a plea of guilty to second-degree murder constituted an acquittal of first degree murder. This Court held the state's abrogation of the implied-acquittal rule after the crime was committed, but before Kring entered his plea, violated the Ex Post Facto Clause, because, in denying Kring the benefit of an implied acquittal to which he would previously have been entitled, the change in the law

"altered the situation to his disadvantage." 107 U.S. at 235; *see Youngblood*, 497 U.S. at 47-49.

In *Youngblood*, the Court stated it could reconcile *Kring* with the definition of an ex post fact law it adopted if it were to say the change in state law had deprived Kring of a "defense" to which he previously had been entitled. 497 U.S. at 50. The Court explained, however, that by "defense" it means something linked to the "legal definition of the offense." *Id.* Thus, for example, "[a] law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done." *Id.* at 49. The Court continued,

> The "defense" available to Kring under earlier Missouri law was not one related to the definition of the crime, but was based on the law regulating the effect of guilty pleas. Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge. . . . The holding in *Kring* can only be justified if the *Ex Post Facto* Clause is thought to include not merely the *Calder* categories, but any change which "alters the situation of a party of his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution.

Id. at 50. Accordingly, the Court expressly overruled *Kring*. *Id.*

In *Thompson v. Utah*, 170 U.S. 343, the defendant was initially convicted by a 12-person jury. A new trial was granted, but, in the meantime, Utah's law had changed, and Thompson was tried by an eight-person jury. The Court had reversed the conviction because retrial by a smaller panel had "materially alter[ed] the situation to Thompson's disadvantage." *Id.* at 352-53. The Court in *Youngblood* expressly overruled

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

No. 01-1757

MARION R. STOGNER, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

OPINION BELOW

The opinion of the California Court of Appeal was filed on November 21, 2001. The appellate court rejected petitioner's ex post facto and due process arguments in the unpublished portion of the opinion, all of which is attached hereto as Respondent's Appendix A. The California Supreme Court's order denying review was filed on February 27, 2002. It is attached to the petition as Petitioner's Appendix B.

JURISDICTION

The decision of the California Supreme Court as to which petitioner seeks review was filed on February 27, 2002. The petition for writ of certiorari appears to have been timely filed on May 28, 2002, within 90 days of that decision. (Sup.

Ct. Rule 13.3.)

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTION AND STATUTES

United States Constitution, Article I, Section 10, Clause 1:

> "No state shall . . . pass any . . . ex post facto Law . . ."

United States Constitution, Amendment XIV, Section 1:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

California Penal Code section 803(g).

STATEMENT OF THE CASE

In April 1998, petitioner was charged with two counts of committing a lewd or lascivious act with a child under the age of 14 years in violation of California Penal Code section 288(a). Count One alleged lewd conduct against Jane Doe I between January 1, 1955 and September 30, 1964. Count two alleged lewd conduct against Jane Doe II between January 1, 1967 and September 27, 1973. Because the normally applicable statute of limitations had expired, the prosecution was commenced pursuant to Penal Code section 803(g), which provides that a complaint alleging the commission of a specified sex offense against a child may be filed within one year of the time the victim reports the crime to a law enforcement agency, provided the act involved substantial sexual conduct and there is independent evidence that clearly and convincingly corroborates the victim's allegation. (Pet. App. C.)

Petitioner demurred on the ground the statute of limitations had expired and Penal Code section 803(g) violated the ex post facto provisions of the state and federal constitutions. The Superior Court granted the demurrer. The prosecution appealed and on October 14, 1999, the appellate court reversed the lower court's order denying the motion to reinstate the complaint. The Court held that it was bound by the California Supreme Court's decision in *People* v. *Frazer*, 21 Cal.4th 737, 763 (1999) which held that section 803(g) does not violate ex post facto principles. (Pet. App. D.)

Petitioner filed a petition for writ of certiorari in this Court, alleging that *Frazer* was wrongly decided. This Court denied that petition on October 2, 2000. (Pet. App. E.)

The complaint was reinstated but subsequently dismissed on motion of the prosecutor when he filed an indictment on March 14, 2001. The indictment charged petitioner with the same crimes as before and commenced the prosecution pursuant to Penal Code section 803(g). (Pet. App. A at 35; Pet. App. F.)

Petitioner demurred to the indictment. The trial court overruled the demurrer, and petitioner sought review in the state court of appeal. Citing *People v. Frazer*, 21 Cal.4th 737, that court held, in an unpublished portion of its opinion, that retroactive application of Penal Code section 803(g) does not violate ex post facto principles or deny a defendant due process of law. (Resp. App. A.)[1/] The California Supreme Court denied review. (Pet. App. B.)

---

1. Respondent's Appendix A is a *complete* copy of the opinion of the First District Court of Appeal, Division Five. The copy of the opinion referenced as Petitioner's Appendix A contains the published portions of the opinion but does not contain the unpublished portions, including those pertaining to the ex post facto and due process claims which he now places before this Court.

REASONS FOR DENYING THE WRIT

ARGUMENT

I.

THE CALIFORNIA SUPREME COURT PROPERLY INTERPRETED *COLLINS V. YOUNGBLOOD*, 497 U.S. 37 (1990) TO FIND PETITIONER'S PROSECUTION DID NOT VIOLATE EX POST FACTO PRINCIPLES

Petitioner argued below that retroactive application of an extended statute of limitations, so as to revive an expired cause of action in a criminal case, violates the federal Ex Post Facto Clause. In *People v. Frazer*, 21 Cal. 4th 737 (1999), the California Supreme Court held otherwise, finding the claim meritless under the formula prescribed in *Collins v. Youngblood*, 497 U.S. 37 (1990) for determining when penal legislation triggers ex post facto protection. *Frazer,* 21 Cal.4th at 754-65.[2/] The court of appeal in the instant case relied upon *Frazer* to reject petitioner's claim; the California Supreme Court summarily denied review. (Pet. App. A & B.)

Petitioner asserts that section 803(g) violates the federal proscription against ex post facto laws articulated in *Calder v. Bull*, 3 U.S. 386 (1798). (Pet. at 13-22.) Respondent

---

2. This Court denied defendant Frazer's petition for writ of certiorari on May 15, 2000, as well as his petition for rehearing on June 29, 2000, in *Frazer v. California* (99-1193). On October 2, 2000, this Court denied petitions for writ of certiorari challenging the validity of *People v. Frazer*, 21 Cal.4th 737 (1999), in *Stogner v. California* (99-8895) and *Poshepny v. California* (99-9713).

respectfully disagrees.

The Ex Post Facto Clause prohibits four categories of laws, first articulated by Justice Chase in 1798: (1) a law that makes criminal and punishes an action done before the passing of the law that was innocent when done; (2) a law that aggravates a crime or makes it greater than it was when it was committed; (3) a law that changes the punishment for a crime and inflicts greater punishment than provided at the time of commission, and (4) a law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of commission of the offense in order to convict the offender. *Calder v. Bull*, 3 U.S. at 390. A review of each of these categories shows that petitioner's ex post facto challenge is unfounded.

A. *Calder* Categories One and Two

Petitioner argues that Penal Code section 803(g) violates the first and second prongs of the Ex Post Facto Clause. (Pet. at 13-14.) Respondent respectfully disagrees as section 803(g) neither makes innocent conduct criminal after the fact, nor does it aggravate the crime of committing a lewd or lascivious act with a child under 14.

Petitioner further argues that Penal Code section 803(g)'s retroactive revival of the statute of limitations violates the Ex Post Facto Clause because it eliminates a defense: the opportunity to plead the previously expired limitations period as a bar to his prosecution. (Pet. at 13.) Pleading an expired limitations period is a defense in the general sense it is a defensive measure. However, as a bar to prosecution, it is distinguishable from a pure defense which defeats one or more of the elements of the crime. Only statutes withdrawing defenses related to the elements of the definition of the crime, or to matters which a defendant might plead as justification or excuse are prohibited by the ex post facto clause. *Collins v. Youngblood*, 497 U.S. 37, 50 (1990).

Thompson as well, stating that, while the right to a jury trial "is obviously a `substantial' one, . . . it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause." *Youngblood*, 497 U.S. at 50-52.

As an example of a case in which a defense could not be denied without violating ex post facto principles, the Court in *Youngblood* cited *United States v. Hall*, 26 F.Cas. 84 (D. Pa. 1809). There, a vessel owner was sued by the United States for forfeiture of an embargo bond obliging him to deliver certain cargo. As a legal excuse, the defendant argued a severe storm had disabled his vessel and forced him to land in Puerto Rico, where he was forced by the Puerto Rican government to sell the cargo. *Youngblood*, 497 U.S. at 49. The Court explained,

> [A]ccording to the law in effect at the time Hall forfeited the cargo, an "unavoidable accident" was an affirmative defense to a charge of failing to deliver cargo. . . . [A] subsequent law imposing an additional requirement for the affirmative defense—that the vessel or cargo actually *be lost at sea* as a result of the unavoidable accident—would deprive Hall of a defense of his actions available at the time he sold the cargo and thus be an invalid ex post facto law.
>
> This analysis is consistent with the *Beazell* framework. A law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done. . . .

Id., original emphasis.

Applying *Youngblood* to this case, revival of the limitations period neither withdraws a defense related to the definition of the crime nor abolishes an affirmative defense of justification or excuse. Plainly, revival of the limitations period does not withdraw a defense related to the crime of committing

lewd or lascivious acts with a child under 14. However, petitioner alleges that the statute of limitations operates as a form of legislatively enacted excuse. (Pet. at 13.) Unlike justification or excuse, the statute of limitations does not put into issue the existence of any of the essential elements constituting the defendant's guilt of the charged offense. Rather, by pleading the statute of limitations, a defendant "simply asserts that by virtue of an extrinsic condition, not relating to the commission of the offense, but recognizing its commission, namely a statute of repose or limitation, he is not now subject to punishment for the crime which he admits having committed." *Osborn v. State*, 194 P.2d 176, 182 (Okla. 1948).

Thus, the California Supreme Court properly interpreted *Youngblood* to find petitioner's prosecution does not violate ex post facto principles.

B. *Calder* Category Three

Petitioner further asserts that the revival of the limitations period increases the punishment for a criminal act after the act was committed because the state may now punish him, whereas previously he could not be punished. (Pet. at 20.) Rather than looking at the Ex Post Facto Clause prohibitions as discreet considerations, petitioner appears to graft the "defense" prong onto the "punishment" prong. The defense prong, however, has no place in an analysis of the punishment prong. As to the latter, the proper question is simply whether the punishment *upon conviction* of the charged crimes is greater than that proscribed for those crimes at the time they were committed.

One of the primary purposes of the Ex Post Facto Clause is to prevent unforeseeable punishment. At the time the charged acts were alleged to have taken place, the punishment for the crime with which petitioner was charged was a term of

one year to life. Stats. 1937, ch. 545, § 1. Hence, if petitioner is convicted, his punishment may not be greater or more burdensome than that which he reasonably should have foreseen at the time he committed the acts. Thus, if petitioner's punishment is not greater than a term of one year to life for each conviction, there will be no ex post facto violation. At this time, however, petitioner's claim is premature.

C. *Calder* Category Four

Shortly after the state Supreme Court decided *Frazer,* this Court issued a decision in *Carmell v. Texas*, 529 U.S. 513 (2000), clarifying the scope of the Ex Post Facto Clause. This Court reiterated that, in addition to the three categories of laws principally discussed in *Youngblood*, the Ex Post Facto Clause also prohibits retroactive laws that alter the legal rules of evidence, and receive less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. In *Carmell* this Court explained, *Youngblood* had not "cast out th[is] fourth category," which had been articulated by Justice Chase in *Calder*. *Carmell, supra,* 529 U.S. at 537. Rather, *Youngblood* "eliminated a doctrinal hitch that had developed in [the] cases, which purported to define the scope of the Clause along an axis distinguishing between laws involving 'substantial protections' and those that are merely 'procedural,'" and it "held that it was a mistake to stray *beyond Calder's* four categories, not that the fourth category was itself mistaken." *Carmell, supra*, 529 U.S. at 539, original emphasis.

Significantly, while *Carmell* reinforced the continued viability of the fourth prong of the Ex Post Facto Clause, it did nothing to undermine the integrity of the discussion in *Youngblood* as it related to the other three prongs — and principally the "defense" prong — of the Ex Post Facto Clause. *Youngblood* remains a clear and unambiguous statement of the

law as to the scope of the "defense" prong of the Ex Post Facto Clause, and the California Supreme Court properly articulated and applied that law in *Frazer*.

Petitioner argues that revival of the statute of limitations violates the fourth prong of the Ex Post Facto Clause. (Pet. at 20-22.) However, revival of the statute of limitations in petitioner's case did not alter the amount or kind of evidence necessary to establish his guilt.

In *Carmell*, this Court examined a Texas statute that was amended to authorize conviction of certain sexual offenses based on a victim's testimony alone, whereas previously the law required both the victim's testimony and corroborating evidence. The amended statute was relied upon to convict the defendant of some sexual offenses on the victim's testimony alone, even though the offenses had been committed before the amendment's effective date. *Id.* at 530-31. The Texas statute fell squarely within the fourth *Calder* category because it "changed the quantum of evidence necessary to sustain a conviction." *Id.* at 530.

In contrast, Penal Code section 803(g) merely addresses when the state may prosecute certain criminal charges. It does not alter the elements of these offenses, or their punishment, or the amount or type of evidence required in order to convict the offender. *See Calder,* 3 U.S. (3 Dall.) at 390 (opn. of Chase, J.) Indeed, unlike an ex post facto law, in which "the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction" (*Carmell*, 529 U. S. at 533), Penal Code section 803(g) actually *increases* the procedural burdens on the government. Before a prosecution brought under section 803(g) can proceed, the government must show the offenses involved "substantial sexual conduct" and must produce "independent evidence that clearly and convincingly corroborates the victim's allegation." Cal. Pen. Code § 803(g)(2)(B).

In sum, petitioner's prosecution under section 803(g)

does not violate the Ex Post Facto Clause and petitioner's claim (Pet. at 21) that this Court's analysis in *Carmell* undermines the legitimacy of *Frazer* is unavailing.[3]

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3. Petitioner alleges certiorari is necessary to resolve "federal issues on which there are conflicts among federal and state courts" and then lists citations in a footnote. (Pet. at 4, n. 3.) However, these cases support the California Supreme Court's construction of *Youngblood*. *United States v. Knipp*, 963 F.2d 839, 843-44 (6th Cir. 1992) [Court of Appeals rejected defendants' claim that extending the statute of limitations prior to its expiration violated the Ex Post Facto Clause]; *United States v. Brechtel*, 997 F.2d 1108, 1113 & n. 13 (5th Cir. 1993) [same]; *Christmas v. State*, 700 So.2d 262, 267-68 (Miss. 1997) [same]; *People v. District Court*, 834 P.2d 181, 200 (1992) [change in death penalty law was found to be ameliorative and did not provide a basis for an ex post facto challenge]; *United States v. Morgan*, 845 F.Supp. 934, 943 (D. Conn.1994) [extension of statute of limitations did not violate the Ex Post Facto Clause]; and *State v. Crawley*, 96 Ohio App.3d 149, 155 (1994) [retroactive application of a judicial decision did not violate the Ex Post Facto Clause]. Petitioner's reference to *State v. Cookman*, 324 Ore. 19, 920 P.2d 1086 (1996), also by footnote without any analysis, similarly fails to demonstrate a basis for certiorari. (Pet. at 4, n. 4.) In that case, the state supreme court held the revival of an expired cause of action violated the state Ex Post Facto Clause, which it interpreted as giving different protection than its federal counterpart.

II.

THE CALIFORNIA SUPREME COURT PROPERLY APPLIED DECISIONS OF THIS COURT TO FIND PETITIONER'S PROSECUTION DID NOT VIOLATE DUE PROCESS PRINCIPLES

Petitioner argued below that retroactive application of California Penal Code section 803(g), so as to revive an expired cause of action, is prohibited by the federal Due Process Clause. In *People v. Frazer*, 21 Cal. 4th 737, the California Supreme Court rejected an identical substantive due process challenge, and it found the defendant's procedural due process claim not ripe for adjudication. *Frazer*, 21 Cal.4th at 765-75.

Petitioner argues legislative revival of a time-barred criminal action is fundamentally unfair. (Pet. at 22-30.) Respondent disagrees. Moreover, the California Supreme Court's decision in *Frazer* does not conflict with decisions of this Court and requires no resolution by this Court.

The Due Process Clause is the source of three different kinds of constitutional protection. First, "it incorporates specific protections defined in the Bill of Rights .... Second, it contains a substantive component, sometimes referred to as `substantive due process,' which bars certain arbitrary government actions regardless of the procedures used to implement them. Third, it is a guarantee of fair procedure, sometimes referred to as `procedural due process,' which applies whenever the state seeks to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 337 (1986).

This Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115 (1992); *Albright v. Oliver*, 510 U.S. 266, 272 (1994). When a particular constitutional amendment "provides an explicit

textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of `substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. at 813, *quoting Graham v. Connor*, 490 U.S. 386, 395 (1989).

This principle is applicable in the instant case. The Framers of the Constitution considered the matter of retroactive changes in the law, and they drafted the Ex Post Facto Clause of Article I, section 10, of the United States Constitution, to address it. That clause, which declares that "[n]o bill of attainder or ex post facto law shall be passed," provides an "explicit textual source of constitutional protection" against retroactive legislative changes in criminal law, and it is not to be supplemented through the device of "substantive due process." *See People v. Frazer*, 21 Cal. 4th at 772 n.31.

Moreover, this Court consistently has exhibited a reluctance to use the Due Process Clause to interfere with a state's ability to control its criminal procedure. *See Medina v. California*, 505 U.S. 437, 445-46 (1992); *Spencer v. Texas*, 385 U.S. 554 (1967); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In *Dowling v. United States*, 493 U.S. 342 (1990), the Court declared that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Id.* at 352. Accordingly, the Court explained, it had defined very narrowly the category of infractions that violate the "fundamental fairness" component of the Due Process Clause. *Id.* Quoting *United States v. Lovasco*, 431 U.S. at 790, the Court stated that an action will be considered fundamentally unfair if it "violates those `fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define `the community sense of fair play and decency.'" *Dowling v. United States*, 493 U.S. at 353, citations omitted.

In *Medina v. California*, 505 U.S. 437, the Court articulated the proper analytical framework for determining the validity of a state criminal procedure under the Due Process

Clause. First, a court looks to "historical practice," which is "probative of whether a procedural rule can be characterized as fundamental." *Id.* at 446, *citing Patterson v. New York*, 432 U.S. 197, 202 (1977). In *Medina*, the Court's historical analysis demonstrated reliance on the common law and on caselaw through the turn of this century. *Id.*; *see also Herrera v. Collins*, 506 U.S. 390 (1993). Contemporary practice, the Court noted, is "of limited relevance to the due process inquiry." *Medina v. California*, 505 U.S. at 447.

At common law, there was no limitation of time for prosecuting a crime. 21 Am.Jur.2d, Criminal Law, § 223, at 408. Then, as now, in the absence of a statutory limitation, a prosecution could be brought at any time following the commission of an offense. *See* 1 Wharton's Criminal Law, § 92, at 628 (15th ed. 1993); Black, *Statutes of Limitation and the Ex Post Facto Clause*, 26 Kentucky L.J. 41 (1937). By Blackstone's time, however, statutes of limitations were common in criminal actions and could be pleaded in bar to a prosecution brought outside the period provided. *See* The American Students' Blackstone at 1007 (Chase's Blackstone 1884).

Sometime prior to 1881, "Mr. Bishop in his treatise on Statutory Crimes, section 266" suggested that "a criminal statute of limitations simply withholds from the courts jurisdiction over the offence after the specified period, and it is competent for the legislature to revive the old jurisdiction or create a new one, when the prosecution may proceed." *Moore v. State*, 43 N.J.L. 203, 213 (E & A 1881). To respondent's knowledge, it was not until 1860 that a court in this country first held a statute of limitations could not operate to revive offenses that were barred at the time of its enactment. *State v. Sneed*, 25 Tex. Supp. at 67; *see* 21 Am.Jur.2d, Criminal Law, § 224, at 411 and n.48, *citing Moore v. State*, 43 N.J.L. 203; *People v. Buckner*, 281 Ill. 340, 117 N.E. 1023 (1917), and *People ex rel. Reibman v. Warden of County Jail*, 242 App. Div. 282, 275 N.Y.S. 59 (1934).

Since that case in 1860, however, few cases have

actually *held* that the revival of a prosecution after the expiration of a statute of limitations is prohibited by the constitution. Rather, by far the majority of cases have involved the extension of a statute of limitations, and any discussion about the revival of a prosecution was merely dicta.[4/] Thus, it

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4. A number of these decisions explain the distinction between the extension of a statute of limitations and the revival of a right of prosecution after the expiration of a statute of limitations in terms of "vested right," that is, that the running of the statutory period "vests" in the criminal an indefeasible right not to be prosecuted—a sort of de facto grant of immunity. The best example of this view, and the apparent source for it, is the majority opinion in *Moore v. State*, 43 N.J.L. 203, which includes an extensive discussion of "vested rights" with reference to the Due Process Clause. The majority, reasoning by analogy to "civil causes," in which the running of a statute of limitations has the effect of vesting title to property, concluded that "every reason which has pressed courts to ascribe finality to the limitation of civil remedies, when once it has attached, impels this court to predicate the same conclusiveness of the bar against criminal prosecutions." *Id.* at 212.

In dissent in *Moore*, Judge Van Sykel rebutted the majority's vested rights analysis and the analogy on which it rested. 43 N.J.L. at 229-56. Just as Judge Van Sykel's dissent from the majority's ex post facto holding anticipated the Supreme Court's opinion on the scope of that prohibition in *Collins v. Youngblood*, 497 U.S. 37, the principles he applied to test the majority's "vested rights" theory were consistent with those later set forth by the Supreme Court in *Albright v. Oliver*, 510 U.S. 266, and *Medina v. California*, 505 U.S. 437, to resolve due process claims. 43 N.J.L. at 240-55. For example, he explained,

> No one, I think, will assert that the preservation and continuation [of the right to assert the statute of limitations as a bar to

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> prosecution] is comparable in importance to the state or to its citizens with the right of trial by jury, the privilege of the writ of *habeas corpus*, the exemption from cruel punishments and illegal searches, or the right of freedom from a second trial after acquittal. Yet, each and all of these vested rights, if not entrenched in the organic law, but arising only by statute, it cannot be doubted, might be swept away at the legislative will. They are beyond the reach of hostile legislation, not because they are vested rights, but for the reason that they are rights guaranteed by a law which is higher than the law-maker.
>
> Something more, then, must be done than to conclude that the defendant had by the lapse of the limitation a vested right to immunity, to justify the court in interposing between the law and the prisoner who has violated it; it must be shown that the vested right has a basis in the constitution itself, either by expression or by clear implication. Not only is there an entire absence of any such sanction for it, but the most diligent search which I have been able to give the subject has failed to find even a suggestion, by any text-writer, or in any judicial opinion, that the doctrine of vested rights has any existence in the law; except in its application to property.
>
> It may be that the right of the defendant, prior to the passage of the act of 1879, to set up the statute of limitations, is of such importance that it ought to have been unassailable, but the framers of our constitution having failed to put this restriction upon the legislature, the courts

has only been relatively recently that courts have held a state may not revive a right of prosecution after the expiration of a statute of limitations, and those courts have been few in number. *See People v. Frazer*, 21 Cal. 4th at 763-64 and n.5.

Moreover, the courts that have held the revival of a prosecution was unconstitutional did so by finding a violation of the Ex Post Facto Clause, not the Due Process Clause. Likewise, those cases that gratuitously remarked upon the constitutionality of the revival of a right of prosecution after the expiration of a limitations period based their comments upon the Ex Post Facto Clause. *See People v. Frazer*, 21 Cal. 4th at 763-64 and n.5.

There is, thus, no settled, long-standing tradition with respect to the revival of a right of prosecution after the expiration of a statute of limitations. Hence, "historical practice" does not provide a basis for finding that the shelter provided by a statute of limitations is a fundamental right, so

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> cannot do it, without in effect assuming to amend the constitution, to make it conform with judicial ideas of what ought to be.
>
> . . . . . .
>
> Adapting [Justice Chase's argument in *Calder* v. *Bull* [3 U.S. (3 Dall.) 386, that the ex post facto prohibition does not apply to contracts] to the present contention, it may with equal force be asked, why was the ex post facto clause engrafted upon the constitution, if the rights which the criminal may at any time have under existing laws, were deemed to be vested rights entitled to the same protection accorded to vested rights of property?
>
> It is obvious that it was never supposed that such a principle could be invoked to support immunity for crime.

43 N.J.L. at 250-51.

that a legislature is prohibited, as a matter of due process of law, from amending it to restore a state's right to prosecute a criminal defendant.

If, however, there is no historical basis for concluding the state procedure violates due process, *Medina v. California*, 505 U.S. 437, requires a court to make a second inquiry. Here, the court inquires "whether the rule transgresses any recognized principle of fundamental fairness in operation." *Id.* at 448, *citing Dowling v. United States*, 493 U.S. at 352.

The most well-known expression of the statement that reviving an expired cause of action is fundamentally unfair is Judge Learned Hand's statement in *Falter v. United States*, 23 F.2d 420 (2d Cir. 1928). It is important, however, to read that statement carefully.

In *Falter*, the defendants argued the extension of a statute of limitations, prior to the expiration of the statute, constituted an ex post facto law. 23 F.2d at 425. Judge Hand rejected their claim, explaining,

> Perhaps they would be right, if the earlier statute had once run in their favor. But the period had not run, and the argument is, and must be, that any change after the commission of the crime, and while the time is running, is within the constitutional prohibition. . . .
>
> In *Mallett v. North Carolina*, 181 U.S. 589 [] (1901), it was held that the allowance of an appeal to the prosecution was constitutional, and *Beazell v. Ohio*, 269 U.S. 167 [], laid it down generally that the question was one of degree and depended upon whether the result was "harsh and oppressive." Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become

> safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the sta[t]e forgives it.

Falter v. United States, 23 F.2d at 425-26.

First, it is important to recognize the victims in *Falter* were not sexually abused children who, by their very nature, differ from the victims of other crimes. Moreover, it is significant that Judge Hand's comment was made in the context of an ex post facto analysis. It was the Ex Post Facto Clause, and not the Due Process Clause, that was alleged by the *Falter* defendants to have been violated by the amendment to the statute of limitations, 23 F.2d at 425, and it was to that allegation that Judge Hand responded. Indeed, both cases he cited, *Mallett* and *Beazell*, involved claims based on the Ex Post Facto Clause; neither made mention of the Due Process Clause. Additionally, the phrase "harsh and oppressive," which Judge Hand quoted from *Beazell*, did not support his subsequent statement that reviving a prosecution was "unfair and dishonest." In *Beazell*, the Supreme Court had stated that "laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive . . . ." 269 U.S. at 170. It is for that reason that laws in violation of the Ex Post Facto Clause are proscribed by the Constitution. As discussed previously, however, a law reviving an expired prosecution does not fall within that category.

Judge Hand's statement about the unfairness of reviving a prosecution has been accepted by subsequent courts with little or no analysis or question. But it is not a sufficient basis upon which to find the application of Penal Code section 803(g), to revive a prosecution "transgresses any recognized principle of fundamental fairness in operation." *Medina v. California*, 505 U.S. at 448.

Fairness, as guaranteed by due process, "is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results." *Snyder v. Massachusetts*, 291 U.S. at 116. Given the unique nature of child molestation cases, retroactive application of California Penal Code section 803(g) does not, *as a matter of law*, violate fundamental fairness. As the state court recognized, in a particular case, retroactive application of the statute may offend due process if the defendant is able to make a factual showing sufficient to prove retroactive application affects the accuracy or fairness of a determination of his guilt or that it obviates or avoids procedures that are necessary for preventing miscarriages of justice. *People v. Frazer*, 21 Cal. 4th at 773-75, *discussing United States v. Lovasco*, 431 U.S. at 796. That question, however, is not presented in this case. *See People v. Frazer*, 21 Cal. 4th at 775.[5/]

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5. Citing *William Danzer & Co. v. Gulf & S.I.R., Co.*, 268 U.S. 633 (1925), petitioner asserts that a criminal statute of limitations creates a substantive right (in contrast to a remedy, or procedural right, which was at issue in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945)) and that retroactive legislation which extinguishes that right violates federal due process. (Pet. at 29, n. 25.) While *Danzer* and its progeny "analyzed the constitutionality of retroactive time bar statutes by drawing the substance versus procedure distinction, a more recent line of Supreme Court cases commands [the courts] to employ a different analysis." *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1075 (4th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996), *discussing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), and *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). The recent cases "together stand for the proposition that the Due Process Clause of the Fifth Amendment allows retroactive application of either federal or state statutes as long as the

statute serves a legitimate legislative purpose that is furthered by rational means." *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d at 1076. Accordingly,

> . . . [T]he analysis used by the Court in *Danzer*, *Chase*, and *Campbell* is outdated and no longer valid for purposes of analyzing the constitutionality of retroactive legislation. The relevant inquiry is whether or not the legislation serves a legitimate legislative purpose that is furthered by rational means.

Id.; *Wesley Theological Seminary v. United State Gypsum Co.*, 876 F.2d 119, 122 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). Thus, petitioner's reliance on *Danzer* is misplaced.

Moreover, in rejecting defendant Frazer's substantive due process claim, the California Supreme Court found that Penal Code section 803(g) serves a rational purpose. The Court explained,

> Of course, substantive due process principles preclude arbitrary and capricious legislation even where no fundamental right or liberty interest is at stake. Contrary to what defendant claims, section 803(g) is not unconstitutional under this deferential standard insofar as the statute "revives" previously time-barred prosecutions. Indeed, as the legislative history suggests, the statute is based on the assumption that past and future sex crimes against children, even though subject to corroboration by independent evidence, would otherwise go unpunished given the difficulty young victims experience remembering and reporting such events, and their emotional vulnerability at the hands of adult perpetrators, including those in positions of trust. The means chosen by the Legislature—allowing prosecution within one year of the official report, inserting express retroactivity and revival provisions, and requiring independent corroboration—seem particularly well suited to addressing the serious concerns underlying section 803(g).

People v. Frazer, 21 Cal. 4th at 773. Thus, retroactive application of Penal Code section 803(g) does not violate due process.

CONCLUSION

For the foregoing reasons, respondent respectfully urges this Court to deny the petition for writ of certiorari.

Dated: September 12, 2002

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PARTIAL PUBLICATION*/

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MARION REYNOLDS STOGNER,

A094828

Petitioner,

V.

THE SUPERIOR COURT OF CONTRA COSTA COUNTY, **(Contra Costa County Super. Ct. No. 010398-6)**

Respondent ;

THE PEOPLE,

Real Party in Interest.

In this proceeding, we revisit the question whether petitioner Marion Reynolds Stogner may be prosecuted for child molestations allegedly committed between 1955 and 1973. In an earlier decision, we concluded that prosecution was not barred by ex post facto or due process principles. *(People v. Stogner* (Oct. 14, 1999, A084772) [nonpub. opn.].) Today we determine that prosecution is not precluded as a matter of statutory interpretation.

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*. Pursuant to California Rules of Court, rules 976(b) and 976.I, parts II, III and IV of this opinion are not certified for publication

PROCEDURAL HISTORY

In April 1998, a criminal complaint was filed charging petitioner with two counts of a lewd act upon a child (Pen. Code,[1] § 288, subd. (a)) committed 25 to 43 years earlier. Count one alleged lewd conduct upon Jane Doe I between January 1, 1955, and September 30, 1964. Count two alleged lewd conduct upon Jane Doe II between January 1, 1967, and September 27, 1973. The complaint acknowledged on its face that the limitations period for the offenses had expired, but alleged that the charges could be prosecuted pursuant to section 803, subdivision (g) (hereafter § 803(g)).

Effective January 1, 1994, section 803(g) extended the limitations period for certain sex offenses to one year following a report to a law enforcement agency by a person of any age that he or she has been the victim of sexual misconduct while under the age of 18.[2] Petitioner successfully demurred to the complaint on the ground that section 803(g) constitutes an ex post facto law, prohibited by the federal and state Constitutions. The district attorney then moved, unsuccessfully, in superior court to reinstate the complaint. On the People's appeal to this court, we reversed the trial court's order pursuant to the Supreme Court's holding in *People v. Frazer* (1999) 21 Cal.4th 737, that section 803(g) is not unconstitutional as an ex post facto law. *(People v. Stogner, supra,* A084772.)

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1. All undesignated section references are to the Penal Code.

2. Subdivision (f) of section 803, enacted in 1989, provides a one year period for prosecution of child molestation charges following a report by a child. Section 803(g), in contrast, covers victims who have reached adulthood.

The complaint was reinstated in superior court but subsequently dismissed on motion of the prosecutor because the prosecutor had obtained a grand jury indictment. That indictment, filed March 14, 2001, again charges petitioner with two counts of child molestation (§ 288, subd. (a)) on two separate victims, Jane Doe I and Jane Doe II, allegedly committed between 1955 and 1964 and between 1964 and 1973, respectively. Again the indictment alleges that the charges may be prosecuted pursuant to section 803(g).

Petitioner demurred to the indictment, asserting, inter alia, that section 805.5 bars application of section 803(g) to this case. Petitioner now seeks relief from the trial court's order overruling his demurrer and allowing the case to proceed to trial. We issued an alternative writ of mandate and stayed the pending trial date. By issuing an alternative writ of mandate, we "necessarily determined that there is no adequate remedy in the ordinary course of law and that [this] case is a proper one for the exercise of our original jurisdiction. [Citations.]" *(Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 773, judg. vacated on other grounds (1971) 403 U.S. 915.)

DISCUSSION

I. STATUTE OF LIMITATIONS

At the time the offenses were allegedly committed (from 1955 to 1973), the statute of limitations specified a three-year period for prosecution of most felonies, including child molestation. (Former § 800, enacted by Stats. 1872; variously amended, as relevant here, from 1880 to 1972, repealed and replaced by § 800, Stats. 1984, ch. 1270, §§ 1, 2, p. 4335.) Consequently, under the law then in effect, prosecution of petitioner would have been barred after 1976.[3]

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3. Effective January 1, 1981, the limitations period for a violation of section 288 was extended to five years. (Stats.

In 1984 the statutory scheme covering limitations periods (§ 799 et seq.) was repealed and replaced by a new statutory scheme, which increased the limitations period for some felonies. (Stats. 1984, ch. 1270, § 2, p. 4335 (the 1984 amendment).) The limitations period for child molestation, however, remained at six years from the date of commission. (§ 800.)

When the 1984 amendment was enacted, one of its provisions, section 806, subdivision (c)(l), provided that the new law was not applicable to offenses for which prosecution was already time-barred. In 1986, former section 806, subdivision (c)(l), was amended and renumbered as section 805.5. (Stats. 1986, ch. 248, § 161, p. 1264.)[4] As the California

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1980, ch. 1307, § 2, p. 4422.) On January 1, 1982, it was extended to six years. (Stats. 1981, ch. 1017, § 1.5, p. 3926; Stats. 1982, ch. 583, § 1, p. 2544.) Under the case law existing at the time, the limitations period could not constitutionally be extended once the initial period had expired. *(Sobiek v. Superior Court* (1972) 28 Cal.App.3d 846, 849-850, now disapproved by *People v. Frazer, supra,* 21 Cal.4th at p. 765.) Even if the extension had applied, of course, it would have been inconsequential; the limitations period would have expired as of 1979.

4. Section 805.5 provides: "(a) As used in this section, 'operative date' means January 1, 1985. [¶I (b) Except as provided in subdivision (c), this chapter applies to an offense that was committed before, on, or after the operative date. [¶I (c) *This chapter does not apply, and the law applicable before the operative date does apply, to an ofiense that was committed before the operative date, if:* [¶I (1) *Prosecution for the offense would be barred on the operative date by the limitation of time applicable before the operative date.* [¶I (2) Prosecution for the offense was commenced before the operative date." (Italics added.)

Law Revision Commission explained, "Subdivision (c)(1) limits retroactive application that would have the effect of lengthening the statute of limitation to reflect the constitutional *ex post facto* prohibition where the statute of limitation has already run on the operative date." (Recommendation Relating to Statutes of Limitation for Felonies (Jan. 1984) 17 Cal. Law Revision Com. Rep. (1984) p. 324, italics in original.) Consequently, in the present case, because the previously-set limitations period applicable to petitioner's offenses had expired in 1976 (or perhaps 1979), the statutory scheme adopted in 1984 would not have permitted prosecution of them.

Effective, January 1, 1994, section 803(g) extended the limitations period beyond six years for certain sexual offenses committed against minors so long as the prosecution commenced within one year following a report to law enforcement authorities by the victim. The crime must have involved "substantial sexual conduct," and the victim's allegation must be corroborated by independent evidence.[5]

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5. As originally enacted, section 803(g) provided in pertinent part: "Notwithstanding any other limitation of time described in this section, a criminal complaint may be filed within one year of the date of a report to a law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. This subdivision shall apply only if both of the following occur: [I] (1) The limitation period specified in Section 800 or 801 has expired. [¶I (2) the crime involved substantial sexual conduct . . . and there is independent evidence that clearly and convincingly corroborates the victim's allegation. . . ." (Stats. 1993, ch. 390, § 1, p. 2226.)

In 1996 the statute was amended to change, among other things, the opening phrase of section 803(g) so that it now reads: "Notwithstanding any other limitation of time described in this *chapter.* . . ." (Italics added.)

In 1996, after several Court of Appeal decisions had declined to apply section 803(g) retroactively to cases where the applicable statute of limitations had already expired, the Legislature amended section 803(g) to declare that "[t]his subdivision applies to a cause of action arising *before, on, or after January 1, 1994,* the effective date of this subdivision, and if the complaint is filed within the time period specified in this subdivision, *it shall revive any cause of action barred by Section 800 or 801."* (Stats. 1996, ch. 130, § 1 (the 1996 amendment) [Assem. Bill No. 2014, adding § 803(g)(3)(A)], italics added.)[6] As the Legislative Counsel's digest explained, the 1996 amendment makes the one-year time limitation "apply to a cause of action arising before, on, or after the effective date . . . , thereby reviving and extending already expired statute of limitations periods." (Legis. Counsel's Dig., Assem. Bill No. 2014 (1995-1996 Reg. Sess.) Thus, when the Legislature amended section 803(g) in 1996, it viewed the ex post facto issue far differently from the way it had in 1984, when the predecessor to section 805.5 was enacted: revival of an expired limitations period was not considered unconstitutional.

Section 803(g) was further amended in 1997, but the changes do not affect our analysis here. (Stats. 1997, ch. 29, § 1.) It bears noting, however, that the amendment left intact the language allowing criminal charges to be filed in cases that were

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6. Before the 1996 amendment to section 803(g), the Supreme Court had granted review in five cases on the issue whether section 803(g) applied when the limitations period had already run. *(People v. Maloy* (S049313); *People v. King* (SO5641 1); *People v. Sowers* (S051278); *People v. Richard G.* (S047826); *People v. Regules* (S048880).) On April 24, 1997, the Supreme Court dismissed review in all those cases in light of the legislative amendment. (See *People v. Frazer, supra,* 21 Cal.4th at pp. 745-746, fns. 5, 6, & 8.)

The Attorney General's request for judicial notice of the orders dismissing review is unnecessary and accordingly denied.

time-barred before 1994. (See generally *People v. Frazer, supra,* 21 Cal.4th at pp. 747-749.)

The question before us is whether the Legislature's expressed intent to apply section 803(g) to offenses committed before January 1, 1994, and to "revive any cause of action barred by Section 800 or 801" operates to allow prosecution of petitioner for the offenses committed between 1955 and 1973. We conclude that it does.

We begin our analysis with *People v. Frazer,* in which the Supreme Court examined whether section 803(g) applies when the statute of limitations had expired before the effective date of section 803(g), January 1, 1994. In *Frazer,* the crimes were allegedly committed in 1984 and the statute of limitations had expired in 1990, but the parties did not dispute that section 803(g) applied. Nevertheless, the court discussed in some detail the application of the statute. We quote pertinent portions of the court's analysis: "At no point has section 803(g) restricted the amount of time that may pass between commission of the crime and commencement of the prosecution.. . . [¶] . . .[¶] [Nlothing in section 803(g) provides that the crime must be committed, or that the limitations period in section 800 or 801 must expire, *after* January 1, 1994, in order for the extended one-year period to apply. The 1996 amendment left no doubt that section 803(g) applies even where the existing statute of limitations expired before January 1, 1994. [¶] . . . [T]lhe Legislature was highly familiar with the various Court of Appeal opinions filed in 1995 and 1996 that declined to apply section 803(g) where 'the previously applicable statute of limitations had expired prior to January 1, 1994, (the effective date of Section 803(g)).' (Assem. Floor Analysis, Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 21, 1996, p. 1.) The legislative record identified these Court of Appeal decisions by name and original published citation, and summarized the statutory and constitutional analysis each used to reach this conclusion. *(Id.* at pp. 1-2; Sen. Com. on Crim. Procedure, Analysis of Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 7-9.) [¶] According

to the legislative record, the primary reason for amending section 803(g) in 1996 was to repudiate these Court of Appeal decisions insofar as they had construed the statute in such a restrictive manner. The 1996 amendment sought to 'clarify,' through express 'retroactivity' and 'revival' provisions, that section 803(g) permitted charges to be filed within one year of the victim's report, even where prosecution of the crime was otherwise time-barred before January 1, 1994. (Sen. Com. on Crim. Procedure, Analysis of Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 5-7; Sen. Floor Analysis, Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 2-4.) [¶] . . . [¶] Thus, consistent with allegations in the complaint, section 803(g) serves as an exception to section 800 in the present case." *(People v. Frazer, supra,* 21 Cal.4th at pp. 752-753, italics in original.)

The court then went on to consider the constitutionality of such a broad extension of the statute of limitations, and the court concluded that section 803(g) is not an ex post facto law insofar as it applies to cases for which the statute of limitations had already expired. *(People v. Frazer, supra,* 21 Cal.4th at pp. 754-765.)

In the case before us, the statute of limitations had expired not only prior to the enactment of section 803(g) but even prior to the enactment of the entire chapter (ch. 2, tit. 3, pt. 2) of the Penal Code in which section 803(g) sits. Petitioner argues that section 803(g) cannot be applied to him because section 805.5, subdivision (c)(l), makes the entire chapter inapplicable to crimes for which the statute of limitations expired before January 1, 1985. We must decide whether, properly interpreted, section 803(g) is an exception to section 805.5 or governed by it.

In construing section 803(g), we are guided by familiar rules of statutory interpretation. "The primary duty of a court when interpreting a statute is to give effect to the intent of the Legislature, so as to effectuate the purpose of the law. [Citation.] To determine intent, courts turn first to the words

themselves, giving them their ordinary and generally accepted meaning. [Citation.] If the language permits more than one reasonable interpretation, the court then looks to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, and the statutory scheme of which the statute is a part. [Citation.] . . . Ultimately, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and it must avoid an interpretation leading to absurd consequences. [Citation.]" *(In re Luke W.* (2001) 88 Cal.App.4th 650, 655.)

The opening phrase in section 803(g) seems designed to make it an exception to other provisions in the same chapter, including section 805.5: "Notwithstanding any other limitation of time described in this chapter . . . ." (§ 803(g)(l).) Petitioner, however, argues that the opening phrase of section 803(g) does not refer to section 805.5, because the latter does not describe a limitations period; it merely addresses the applicability and operative date of the chapter. We decline to make such a fine distinction. Section 805.5, subdivision (c)(l), states that, as to offenses for which prosecution is time-barred by the limitations periods applicable before January 1, 1985, the previous limitations periods apply. (See fn. 4, *ante.)* Section 803(g), in turn, sets a one-year-from-date-of-report limitations period, "notwithstanding any other limitation of time." On its face, then, section 803(g) creates an exception to other limitations periods, even those limitations periods referred to in section 805.5 that had expired before January 1, 1985.

Even if petitioner's interpretation of the initial clause in section 803(g) is reasonable, we believe that the Legislature intended to eliminate all constraints on the effect of section 803(g), except those contained in that subdivision. Section 803(g) was obviously designed to preclude child molesters from escaping punishment merely because the molestation was revealed after the victim became an adult and after the

limitations period had elapsed. Certainly the Legislature was aware that children who are the victims of sex crimes often cannot recognize or effectively assert their victimization until they have reached adulthood. Moreover, victims of sex crimes may be more likely to delay reporting because they are afraid of reprisals or fearful that they will not be believed. The legislative purpose behind section 803(g) was to prevent sex offenders from reaping the benefits of their victim's immaturity and psychological trauma, and the legislative history plainly indicates that section 803(g) was intended to create an exception to the statutes of limitations. (See, e.g., Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 290 (1993-1994 Reg. Sess.) Apr. 13, 1993, pp. 2-3; Sen. Com. on Judiciary, Analysis of Assem. Bill No. 290 (1993-1994 Reg. Sess.) July 13, 1993, pp. 2-3.)

Furthermore, the 1996 amendment to section 803(g) was intended to maximize the impact of the statute by ensuring that the prosecution's ability to file charges is "revive[d]" regardless of the passage of time between the commission of the crime and the commencement of prosecution, as long as the charges are filed within one year of the victim's report. "Sex crimes committed against children are the most heinous of offenses. Unfortunately, many don't bring the crime to the attention [of] law enforcement until many years later, when the statute of limitations has already expired. Children become double victims-first victimized by the perpetrator and again by the judicial system. This measure will *guarantee* them their day in court." (Assem. Com. on Pub. Safety, Analysis of Assem. Bill. No. 2014 (1995-1996 Reg. Sess.) Apr. 9, 1996, p. 1 [according to the author], italics added.)

The Legislature intended to override the Court of Appeal decisions that had refused to apply section 803(g) retroactively to crimes for which the statute of limitations had expired. *(People v. Frazer, supra,* 21 Cal.4th at pp. 752-753.) There is no hint in the legislative history that less than complete retroactivity was intended, so long as charges were filed within

one year of the victim's report. Yet petitioner's interpretation of sections 803(g) and 805.5 would accomplish a significant constraint. We reject it.

We recognize that in *Lynch v. Superior Court* (1995) 33 Cal.App.4th 1223, 1228, disapproved on the ex post facto issue in *People v. Frazer, supra,* 21 Cal.4th at page 765, the court took a contrary view and concluded that section 805.5, subdivision (c)(l), makes section 803(g) inapplicable to crimes for which the statute of limitations had expired as of January 1, 1985. However, the court's discussion was cursory and did not address the precise points presented in the briefing before us. Furthermore, as the Supreme Court noted in *Frazer,* the Legislature's primary reason for amending section 803(g) in 1996 was to repudiate certain Court of Appeal decisions that had declined to apply the statute retroactively. *(People v. Frazer, supra,* at p. 753.) Among those decisions identified by the Legislature was *Lynch v. Superior Court, supra,* 33 Cal.App.4th 1223, which was described as holding "that application of Section 803(g) . . . violated constitutional ex post facto principles, and is prohibited as a matter of statutory construction in light of Penal Code Section 805.5 . . . ." (Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 2014 (1995-1996 Reg. Sess.) Apr. 9, 1996, p. 2.) The language of the 1996 amendment to section 803(g), added as a response to and a repudiation of *Lynch,* providing that the subdivision applies even to offenses committed before January 1, 1994, and that the subdivision "shall revive any cause of action barred by Section 800 or 801" (§ 803(g)(3)(A)), could not be more explicit in reflecting the Legislature's intent to override the existing limitations periods for those offenses for which prosecution is time-barred.

In light of the evident legislative purpose, we construe the beginning phrase of section 803(g)-"[n]otwithstanding any other limitation of time described in this chapter"-to reflect an intent to supersede section 805.5 insofar as it affects limitations periods. Although we are cognizant of the principle that statutes

should be read in harmony with each other whenever possible, we cannot accept petitioner's argument that section 803(g) should be read as subordinate to section 805.5. In our view, section 803(g) creates an exception to section 805.5 and is not controlled by it.

Finally, interpreting the relationship between sections 803(g) and 805.5 as petitioner suggests would serve no apparent legislative purpose. As noted above, when originally enacted as part of a package of statutes, section 805.5 served the Legislature's goal of avoiding a conflict with the ex post facto clause by precluding prosecution of any offense for which the statutory period had run. With the enactment of section 803(g), however, the Legislature's goal changed, and section 805.5 played no role in the efforts to extend the limitations periods and revive molestation charges that would otherwise be time-barred.[7]

In any event, even under petitioner's view that section 805.5 governs the application of section 803(g), section 805.5 would not affect all prosecutions equally. Section 805.5 would bar prosecution of any molestation that was already time-barred as of January 1, 1985, i.e., one that was committed prior to January 1, 1979, more than six years before the chapter's operative date. But section 805.5 would have no effect on offenses committed after January 1, 1979; the charges would be revived by section 803(g). Thus, under petitioner's interpretation, a complaint filed in 1994, after section 803(g) took effect, could have properly charged an offense committed in 1979, a then 15-year-old offense, but not one committed in

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7. The operative date of section 805.5 is January 1, 1985. When enacted, section 805.5 applied to a chapter that did not include section 803(g). Given the specificity of section 805.5 regarding its operative date, we read it as applying to the chapter enacted in conjunction with it and not to subsequent legislation.

1978.[8] A complaint filed in 2001 could likewise charge a molestation which occurred in 1979, now 22 years after the fact. In 2009, a 30-year-old offense could be prosecuted. Petitioner's interpretation of section 805.5 would impose a limitations period based simply on the date of the occurrence of the offense-a factor unrelated to the traditional reasons for limitations periods.

In crafting an appropriate length of a limitations period, the Legislature balances competing interests. On the one hand, a statute of limitations protects an accused from the consequences of charges grown stale with age: unreliable memories, dead or missing witnesses, and lost or contaminated physical evidence. (Recommendation Relating to Statutes of Limitation for Felonies (Jan. 1984) 17 Cal. Law Revision Com. Rep., *supra,* p. 308.) At the same time, the Legislature also considers the nature and seriousness of the offense.[9] Section 803(g) reflects a reasonable legislative concern for certain crimes where delayed reporting is common and serves to revive otherwise time-barred charges for a brief period after the victim's report is made. We can discern no logical reason why the Legislature would retain a limitations period based not on the age of the offense, but on its date of occurrence. We do not believe the Legislature intended this result, and we refuse to

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8. This is true because a three-year statute of limitations applied to molestation offenses committed in 1978 and 1979. That period was lengthened to five years, effective January 1, 1981, and six years, effective January 1, 1982. (See fn. 3, *ante.)* The 1978 offense was, therefore, time-barred before the effective date of section 805.5, while the 1979 offense was not.

9. Some offenses may be prosecuted at any time without regard to a limitations period. (§ 799.) Other offenses must be prosecuted within the prescribed limitations period, but the limitations period does not commence to run until the offense was discovered. (§ 803, subds. (c) & (e).)

impose it.[10/]

We recognize, of course, that the effect of our holding today is to make possible the prosecution of offenses reaching far back in time. We observe, however, that the express requirement in section 803(g) for a greater quantum of evidence provides some protection against the erosion of memories and evidence caused by the passage of time.

II. EX POST FACTO LAW*

Petitioner contends that *People v. Frazer, supra,* 21 Cal.4th 737, was wrongly decided and that the flaws in the California Supreme Court's reasoning are made apparent by the subsequent decision of the United States Supreme Court in *Carmell v.Texas* (2000) 529 U.S. 513. (See generally *In re Melvin J.* (2000) 81 Cal.App.4th 742, 758, fn. 7 [recognizing the erroneous analysis].) We are, of course, bound to follow our Supreme Court's decision in *Frazer,* and we leave it to that court to decide whether *Frazer* should be reexamined. In any event, we note that even after its decision in *Carmell,* the United

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10. In light of our conclusion, we summarily reject petitioner's argument that section 803(g) revives only causes of action "barred by Section 800 or 801" and that this language must refer only to the version of sections 800 and 801 in effect when section 803(g) took effect (Jan. 1, 1994), not the version that had been repealed when the predecessor to section 805.5 took effect (Jan. 1, 1985). This argument presumes that section 805.5, subdivision (c)(l), controls, but we have rejected that premise. In any event, the language of section 803(g) upon which petitioner relies seems to have been included in the statute solely to clarify that the one-year-from-date-of-report limitations period extends the time for prosecution and does not cut short the longer periods provided in sections 800 and 801.

* See footnote, *ante*, page 1.

States Supreme Court declined to review *Frazer. (People v. Frazer, supra,* 21 Cal.4th *737,* cert. denied (2000) 529 U.S. 1108, rhrg. denied (2000) 530 U.S. 1284.)

III. DUE PROCESS*

Petitioner contends that prosecuting him for offenses for which the statute of limitations had expired would violate due process protections. An identical argument was rejected in *People v. Frazer, supra,* 21 Cal.4th at pages 765-775. Although the court held that a claim of a *procedural* due process violation was not yet ripe for adjudication, the court concluded "there is no basis on which to facially invalidate section 803(g), either on the ground its one-year limitations period leads to excessive charging delays, or on the ground section 803(g) applies even where the six-year period in section 800 'has expired.' " *(People v. Frazer, supra,* at p. 775, fn. omitted.)

Following *Frazer,* in the appeal in petitioner's case, we recognized the possibility of a due process claim based upon the lengthy delay between the commission of the offenses and the filing of criminal charges. However, as in *Frazer,* we concluded that such a claim is not yet ripe for adjudication: "[D]efendant's constitutional claim was addressed below on demurrer, and we have no information about the particular circumstances of the case. Whether precomplaint delay is unjustified and prejudicial is a question of fact for the trial court. *(People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911-912.) Accordingly, we will leave it to the trial court to examine *in an appropriate proceeding* the reasons for the 25-to-43-year delay and the resulting damage to defendant's ability to refute the charges." *(People v. Stogner, supra,* A084772, at p. 3; italics added.)

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* See footnote, *ante,* page 1.

Once again, this issue comes to us after a ruling on demurrer, with no factual record developed on whether it would be fundamentally unfair to require petitioner to stand trial. Again we leave the matter for an appropriate proceeding in the trial court.

IV. SEPARATION OF POWERS*

Petitioner argues that section 803(g) is unconstitutional in that it violates the separation of powers doctrine by allowing the victim to control when charges will be brought. The argument is wholly meritless.

In virtually all criminal prosecutions victims make important decisions that may affect the ability of the prosecutor to successfully bring charges. Such decisionmaking has no bearing on the separation of powers doctrine. The separation of powers doctrine prohibits one branch of government from infringing upon the powers of another.[11/] The victim of a crime is not a state officer charged with the exercise of either legislative, executive or judicial power.

Petitioner's argument rests upon the basic notions that the prosecutor has sole responsibility for prosecuting criminal offenses and a private citizen has no standing to compel the prosecutor to act. *(Dix v. Superior Court* (1991) 53 Cal.3d 442, 451; *Taliaferro v. Locke* (1960) 182 Cal.App.2d 752, 757.) Those principles have no application here. The authority of the public prosecutor is not impaired by section 803(g). The prosecutor retains sole discretion to determine whether to file

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11. Article 111, section 3, of the California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted in this Constitution."

* See footnote, *ante,* page 1.

charges, whom to charge, what charges to file, and what punishment to seek.

DISPOSITION

The alternative writ is discharged, the stay is lifted, and the petition is denied.

SIMONS, J.

We concur.

JONES, P.J.

STEVENS, J.

Stogner v. Superior Court (A094828)

Trial Judge	Laurel Lindenbaum, Judge
Trial Court	County of Contra Costa Superior Court No. 010398-6
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(4)

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In The Supreme Court

OF THE

United States

OCTOBER TERM, 2002

MARION REYNOLDS STOGNER
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of California

BRIEF IN REPLY

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REPLY

The state claims that Petitioner is vested with no fundamental right in this case pursuant to an expired statute of limitations. Even were that true, they can assert no basis for a claimed "retention" of an expired power to prosecute. Indeed, such a proposition is contrary to all accepted views of constitutional government. For if the inalienable rights of life and liberty are vested in the people, and if in limited circumstances the state is permitted to curtail that liberty, when that permission ends, even if by nothing more than an act of legislation, then the state is without the power to act.[1] Thus even if it can be agreed that an accused is not "vested" with a statute of limitations defense, that does not mean that the state has vested itself with the power to revive an expired claim.

The state further argues that this Court must limit its analysis to the Ex Post Facto Clause, as it is the only available remedy to Petitioner's claim. It is without question that a violation of the Constitution can occur under more that one provision or amendment. Nothing in *Graham v. Connor*, 490

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[1] "[The statute of limitation's] terms not only strike down the right of action which the state had acquired by the offence, but also remove the flaw which the crime had created in the offender's title to liberty. In this respect, its language goes deeper than statutes barring civil remedies usually do. They expressly take away the remedy only by suit, and that inferentially is held to abate the right which such remedy would enforce, and perfect the title which such remedy would invade; but this statute is aimed directly at the very right which the state has against the offender, the right to punish, at the only liability which the offender has incurred, and declares that this right and this liability are at an end." *Hart Moore v. State*, 43 N.J.L. 203 (1881); *see also Grisuold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg J., concurring) (although "... a ... State may ... serve as a laboratory; and try novel social and economic experiments, I do not believe that this includes the power to experiment with the fundamental liberties of citizens ...") *quoting Poeuter v. Texas*, 380U.S. 400, 413 (1965).

U.S. 396 (1989) would require otherwise, and subsequent cases such as *U.S. v. Lanier*, 520 U.S. 259,272 fn 7 (1997) and *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) have made this clear. Indeed one of the principle cases relied on by Petitioner, *Carmell v. Texas*, 529 U.S. 513, 536-37 (2000), noted that simply because a law might be a bill of attainder did not mean it was not an ex post fact law as well. Quite clearly then if this Court concludes that Petitioner has not shown that this legislation violates the ex post facto clause, then it should be analyzed under substantive due process principles. *See Albright v. Oliver*, 510 U.S. 266 (1994).[2]

ARGUMENT

Petitioner Marion Stogner has the fundamental right to be free from prosecution, twenty-two years after the statute of limitations has run. *See Falter v. United States*, 23 F.2d 420 (2d. Cir. 1928); *State v. Sneed*, 25 Tex.Supp. 66 (1860); *Hart Moore v. State*, 43 N.J.L. 203 (1881); *State v. Cookman*, 127 Or.App. 283 (1994); *State v. Martin*, 138 N.H. 508 (1994.)

Throughout the history[3] of the United States, the various states and federal government have established

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[2] "To be sure, we have held that a criminal rule or procedure that does not contravene one of the more specific guarantees of the Bill of Rights may nonetheless violate the Due Process Clause if it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Albright v. Oliver*, 510 U.S. 266, 282 (1994) (Kennedy J. and Thomas J., concurring.)

[3] The historical practice even at common law in England shows a general repugnance towards retrospective legislation in general. *See Dash v. Van Kleeck*, 7 Johns 477 (1811.) "There has not been, perhaps a distinguished jurist or elementary writer, within the last two centuries, who has had occasion to take notice of retrospective laws, either civil or criminal, but has mentioned them with

statutes of limitation for various crimes. Since the country's earliest days the meaning of these statutes has been unambiguous. When the statute of limitation has expired, so too has the cause of action.

So clear has this rule been that throughout the country's history it has only been disputed on rare occasions. Until *Frazer* each such attempt to impose retroactive legislation to expired statute of limitations cases was rejected. *See People v. Frazer*, 21 Cal.4th 737 (1999). A challenge was proffered in 1860 in Texas, and rejected. *See State v. Sneed*, 25 Tex.Supp. 66 (1860) ("The state having neglected to prosecute within the time prescribed for its own action, lost the right to prosecute the suit.") There were similar challenges with similar results in New Jersey in 1881 and in Oregon in 1994. *See Hart Moore v. State*, 43 N.J.L. 203 (1881) ("Until the fixed period has arrived, the statute is a mere regulation of the remedy, and, like other such regulations, subject to legislative control; but afterwards, it is a defence, not of grace, but of right; not contingent, but absolute and vested; and, like other such defences, not to be taken away by legislative enactment.")[4]; *State v. Cookman*,

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caution, distrust or disapprobation." *Dash*, 7 Johns 477 (Kent, Ch., J. 1811.)

[4] Although also cited to support their argument, the opposition conveniently ignores that in 1881 the New Jersey high court struck down the retroactive legislation, and that, in so doing that court rejected the jurisdictional argument cited in their brief. *See Hart Moore v. State*, 43 N.J.L. 203 (1881) ("[I]t would be a strained and unnatural interpretation of our act to say that it simply withholds jurisdiction from the court.. Its language ... does not relate to the courts, but to the person accused. The answer which under it, the defendant must make to an accusation before the tribunal which once had the right to punish him, is, not that the court has no jurisdiction to inquire into his guilt or innocence and pass judgment, but that, after inquiry, the court must pronounce judgment of acquittal. And probably no one would contend that

127 Or.App. 283 (1994) ("In short, we cannot accept the proposition that the state has the supernatural power to exhume and revitalize a prosecution that is dead and buried.")

That even our most learned jurists believed it to be unassailable is clear from the writings of Chief Justice John Marshall. *See Adams v. Woods*, 6 U.S. 336 (1805)("This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years ..."); *Pendergast v. United States*, 317 U.S. 412 (1942); *see also Falter v. United States*, 23 F.2d 420 (1928). Case law is replete with examples of citizens forfeiting their Fifth Amendment rights precisely because they could no longer be prosecuted where the statute of limitations applied, and therefore were not subject to incriminating themselves in a criminal prosecution. *See Brown v. Walker*, 161 U.S. 591, 597 (1896); *Hale v. Henkel*, 201 U.S. 43 (1906); *Ex Parte Louis Cohen*, 104 Cal. 524 (1894); *Blackburn v. Superior Court*, 21 Cal.App.4th 414, 428 (1993)[5]. The holdings of these cases are clear and to the point. The existence then of criminal statutes of limitations and their finality is indeed so deeply rooted in our traditions and consciousness as to trigger the relinquishment of other rights routinely afforded to criminal defendants.

Despite the opposition's contention, at no point in our history has the opposite rule been shown to exist. *See*

---

after such judgment, any change in the law could legally subject the defendant to a second prosecution.") California courts are in accord.

[5] It is interesting to note that as recently as 1993 California reaffirmed the finality of its statute of limitations relevant to child molest cases, finding that petitioner had not made a sufficient showing that his testimony would incriminate him in a case concerning child molest where the statute of limitations had run.

People v. Frazer, 21 Cal.4th 737 (1999). [6] Indeed in only a limited line of civil cases has the statute of limitations been deemed subject to retroactivity[7], and only where the underlying right was conclusively shown not to have been destroyed. *See Campbell v. Holt*, 6115 U.S. 620 (1885).

In contrast, California's own historical practice reflects the view that the criminal statute of limitations destroys not only a remedy but also the right of action itself. Moreover, by conferring a substantial benefit to the accused this Court must also examine whether this benefit itself can be taken without due process of law. *See Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972)

CONCLUSION

"The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125

---

[6] "Today, California becomes the only jurisdiction, state or federal, to permit "revival" prosecutions under an extended statute of limitations enacted after the expiration of the original statute of limitations. All other jurisdictions that have addressed the issue have concluded or assumed that these prosecutions violate article I, section 10, clause 1 of the federal Constitution, which provides that '[n]o state shall pass any ... ex post facto law ...'." *Frazer* at 777 (Kennard J., dissenting) (citations omitted).

[7] The line of Supreme Court cases referred to in the Opposition Brief cited in *Shadborne –Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1073 (1995) are all economic cases and are not statute of limitation cases at all. Nevertheless, even the *Shadborne-Vinton* court acknowledged *Dinh v. Rust International Corp.*, 974 F.2d 500 (4th Cir. 1992) where the statute of repose had, as has been the case for Petitioner here, created substantive rights that *could not* be legislatively destroyed once vested. *Shadborne-Vinton* at 1077.

(1990) *quoting Daniels v. Williams*, 474 U.S. 327, 331 (1986). This Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *quoting U.S. v. Salerno*, 481 U.S. 739, 750 (1987).

In Petitioner's case, not only has California put a period at the end of the time by which a prosecution could have been instituted, they, in effect, put an exclamation point when they reaffirmed the termination date as codified in Penal Code section 805.5. California has stated in no uncertain terms that their power to prosecute has ended. Simultaneously, they have decided that Petitioner has been conferred thereby a substantial right. His liberty interest is then inviolate.[8] The

---

[8] The state would have this Court ignore the history of both California and the United States in this regard. Rather they would equate the Petitioner's clearly defined substantive rights and liberty interest with nothing more than vague economic interest type cases.

However, even if the court were to engage in a balancing test, the result should still favor Petitioner, *Frazer* proffered the following justification for the legislation: the difficulty by alleged victims in remembering the wrongs themselves, and/or the "emotional vulnerability at the hands of the perpetrators." *People v. Frazer*, 21 Cal.4th 737, 773 (1999). Such justifications may well sustain an increase in the limitations period in prospective cases, however this justification ignores that society by its use of statutes of limitations has *already* taken into account that the passage of time will naturally void even sympathetic claims. Indeed, to the extent that some perpetrators of crimes will escape punishment holds true for all crimes subject to a statute of limitations and has *always* been a cost society has been willing to incur in exchange for the benefits of repose. Moreover, because Penal Code section 803(g) is not limited in any fashion to victims who have repressed the wrongs done them, and might therefore claim recent discovery of the harm, or who might otherwise be prevented from pressing the claim by the alleged perpetrator, any person can trigger the provisions of Penal Code section 803(g) at *any* time *they* choose, regardless of their own knowledge or ability to press the claim.

state has retained no power upon which it can infringe Petitioner's liberty interest. "In our society liberty is the norm." *Salerno* at 755.

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated this 16th day of October, 2002

Respectfully submitted,

_____

Roberto Najera (Counsel of Record)
Elisa Stewart
Office of the Alternate Defender
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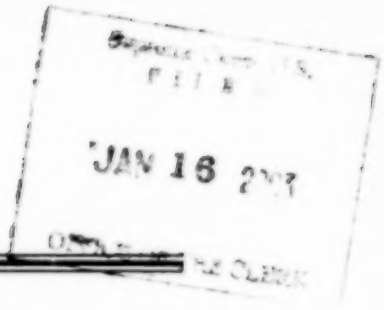
Martinez, California 94553
(925) 646-1740
Counsel for Petitioner



No. 01-1757

In The Supreme Court of the United States

MARION REYNOLDS STOGNER, Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

JOINT APPENDIX

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APPENDIX A

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF CONTRA COSTA
DELTA JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, — NO. 110032-0
DA NO. X 98 000097-6

VS.

COMPLAINT – FELONY

MARION REYNOLDS STOGNER, DEFENDANT./

01) PC 288(a)
02) PC 288(a)

The undersigned states, on information and belief, that MARION REYNOLDS STOGNER, Defendant, did commit a felony, to wit:

Violation of PENAL CODE SECTION 288(a) (LEWD AND LASCIVIOUS ACT UPON CHILD), committed as follows, to wit:

On or about January 1, 1955 through September 30, 1964, at Antioch, in Contra Costa County, the Defendant, MARION REYNOLDS STOGNER, did willfully, unlawfully, lewdly and feloniously commit a lewd and lascivious act upon and with the body of Jane DOE I, who was a child under the age of fourteen years, with the intent to arouse, appeal to and gratify the lust, passion and sexual desires of Jane DOE I and of the Defendant, MARION REYNOLDS STOGNER.

STATUTE OF LIMITATION (PC 803)

It is further alleged, that the crime alleged in Count One above, can be prosecuted pursuant to Penal Code section 803(g), in that:

On February 19, 1998, Jane Doe I reported to a law enforcement agency that she, while under the age of 18 years, was the victim of sexual crimes as specified in Penal Code section 803(g), to wit, 288;

The limitation period specified in Sections 800 and 801 has expired as to the charged crime;

The crime involved substantial sexual conduct as defined in Section 1203.066(b), to wit, oral copulation;

There is independent evidence that clearly and convincingly corroborates the allegations in Count One, to wit, the statement of another victim (Jane DOE II) alleging that she is a victim of similar crimes perpetrated by defendant as alleged in Count Two, below.

COUNT TWO:

The undersigned further states, on information and belief, that MARION REYNOLDS STOGNER, Defendant, did commit a felony, to wit:

Violation of PENAL CODE SECTION 288(a) (LEWD AND LASCIVIOUS ACT UPON CHILD), committed as follows, to wit:

On or about January 1, 1967 through September 27, 1973, at Antioch, in Contra Costa

County, the Defendant, MARION REYNOLDS STOGNER, did willfully, unlawfully, lewdly and feloniously commit a lewd and lascivious act upon and with the body of Jane DOE II, who was a child under the age of fourteen years, with the intent to arouse, appeal to and gratify the lust, passion and sexual desires of Jane DOE II and of the Defendant, MARION REYNOLDS STOGNER.

STATUTE OF LIMINATIONS (PC 803)

It is further alleged, that the crime alleged in Count One above, can be prosecuted pursuant to Penal Code section 803(g), in that:

On February 19, 1998, Jane Doe II reported to a law enforcement agency that she, while under the age of 18 years, was the victim of sexual crimes as specified in Penal Code section 803(g), to wit, 288;

The limitation period specified in Sections 800 and 801 has expired as to the charged crime;

The crime involved substantial sexual conduct as defined in Section 1203.066(b), to wit, oral copulation;

There is independent evidence that clearly and convincingly corroborates the allegations in Count One, to wit, the statement of another victim (Jane DOE II) alleging that she is a victim of similar crimes perpetrated by defendant as alleged in Count One, above.

COMPLAINANT REQUESTS THAT DEFENDANT(S) BE DEALT WITH ACCORDING TO LAW. I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: April 17, 1998 AT MARTINEZ, CALIFORNIA

_____

C. FORSYTH
COMPLAINANT

_____

BRIAN S. BAKER/dh
DEPUTY DISTRICT ATTORNEY
CONTRA COSTA COUNTY SHERIFF

APPENDIX B

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,
Plaintiff and Appellant — A084772

v.

MARION REYNOLDS STOGNER,
Defendant and Respondent. — (Contra Costa County Super. Ct. No. 9816224)

The sole question raised in this People's appeal is whether the Legislature's effort to revive the prosecution of certain sex offenses for which the limitations period has already expired (Pen. Code,§ 803, subd. (g)) is unconstitutional as an ex post facto law. In accordance with the recent decision in People v. Frazer (1999) 21 Cal.4th 737, we reverse the trial court's order denying the prosecution's motion to reinstate the complaint.

PROCEDURAL HISTORY

In April 1998, a criminal complaint was filed charging defendant with two counts of a lewd act upon a child (Pen. Code, § 288, subd. (a)) committed 25 to 43 years earlier. Count I alleged lewd conduct upon Jane Doe I between January 1, 1955, and September 30, 1964. Count II alleged lewd conduct upon Jane Doe II between January 1, 1967, and September 27, 1973. The complaint acknowledged on its face that the limitations period for the offenses had

expired, but the complaint alleged that the charges could be prosecuted pursuant to Penal Code section 803, subdivision (g) (hereafter section 803(g)).

Section 803(g), enacted in 1994, extends the limitations period for certain sex offenses to one year following a report to a law enforcement agency by a person of any age that he or she has been the victim of "substantial" sexual misconduct while under the age of 18.1 Defendant demurred to the complaint on the ground that section 803(g) constitutes an ex post facto law prohibited by the federal and state Constitutions. After the magistrate sustained the demurrer, the district attorney moved in superior court to reinstate the complaint. The motion was denied, and the People now appeal from the order denying that motion.

DISCUSSION

Our Supreme Court has rejected the argument that section 803(g) constitutes an impermissible ex post facto law. In the court's words: "Statutes regulating the time at which a future criminal prosecution may be filed do not implicate the manner

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1 Section 803(g) presently provides in pertinent part as follows: "(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. [¶] (2) This subdivision applies only if both the following occur: [¶] (A) The limitation period specified in Section 800 or 801 has expired. [¶] (B) The crime involved substantial sexual conduct...and there is independent evidence that clearly and convincingly corroborates the victim's allegation.....(3)(A) This subdivision applies to a cause of action arising before, on, or after January 1, 1994,...and it shall revive any cause of action barred by Section 800 or 801 if any of the following occurred or occurs:...(ii) The complaint or indictment is or was filed subsequent to January 1, 1997, and it is or was filed within the time period specified within this subdivision."

in which criminal conduct is defined and punished at the time it occurs—the sole concern of the ex post facto clause." (People f. Frazer, supra, 21 Cal.4th at p. 763.) Moreover, the court further concluded that section 803(g) is not unconstitutional in the abstract as a violation of substantive or procedural due process principles under the federal and state Constitutions. (21 Cal.4th at pp. 765-775.)

Because we are bound by that ruling, we are compelled to reverse the trial court's order.2 We observe, however, that the Supreme Court in Frazer left open the possibility of a due process claim in an appropriate case. The courts have long recognized that unreasonable delay between the time the offense is committed and an accusatory pleading is filed may violate a defendant's rights to a fair trial and due process of law under the federal and state Constitutions. (People v. Morris (1988) 46 Cal.3d 1, disapproved on other grounds in In re Sassounian (1995) 9 Cal.4th 535, 543, fn. 5, & 545, fn. 6, & cases cited in Morris at p. 37.) The Frazer court concluded that a determination of unconstitutional preaccusation delay can be made only upon consideration of the particular circumstances in an individual case. (Frazer, supra, 21, Cal.4th at pp. 774-775.) The case before it having arisen on demurrer, the court found the defendant's claim not ripe for adjudication and declined to decide whether the 12-year lapse between the alleged commission of the offense and the filing of the criminal complaint violated the defendant's procedural due process rights. (Id. At p. 775.)

---

2 In his respondent's brief on appeal, defendant raises for the first time a new constitutional argument that section 803(g) violates the separation of powers doctrine. Because that issue was not raised either by defendant below or by the People on appeal, we decline to address the issue.

In the present case, too, defendant's constitutional claim was addressed below on demurrer, and we have no information about the particular circumstances of the case. Whether precomplaint delay is unjustified and prejudicial is a question of fact for the trial court. (People v. Dunn-Gonzalez (1996) 47 Cal.App.4th 899, 911-912.) Accordingly, we will leave it to the trial court to examine in an appropriate proceeding the reasons for the 25-to-43-year delay and the resulting damage to defendant's ability to refute the charges.

DISPOSITION

The order denying the motion to reinstate the complaint is reversed.

_____

Jones, P.J.

We concur:

_____

Haning, J.

_____

Stevens, J.

A084772

APPENDIX C

Supreme Court of the United States

Marion Reynolds STOGNER, petitioner,
v.
CALIFORNIA.

No. 99-8895.

Oct. 2, 2000.

Petition for writ of certiorari to the Court of Appeal of California, First Appellate District, denied.

APPENDIX D

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Telephone: (925) 646-4500

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THECOUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE OF CALIFORNIA,

v.

No.
DA NO. X 98 000097-6
INDICTMENT

MARION REYNOLDS STOGNER, DEFENDANT./

PC 288(a)
PC 288(a)

The Grand Jury of the County of Contra Costa hereby accuses MARION REYNOLDS STOGNER, defendant, of the crime of a felony, a violation of PENAL CODE SECTION 288 (LEWD ACT UPON CHILD UNDER AGE 14), committed as follows:

On or about January 1, 1955 through September 30, 1964, at Antioch, in Contra Costa

County, the Defendant, MARION REYNOLDS STOGNER, did willfully, lewdly, and unlawfully commit a lewd and lascivious act upon and with the body of Jane Doe I, a child who was under the age of fourteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the Defendant and Jane Doe I.

JURISDICTIONAL ALLEGATION
STATUTE OF LIMITATIONS
MINOR SEXUAL ASSAULT CRIME

It is further alleged, that the crime alleged in Count One above, can be prosecuted pursuant to Penal Code section 803(g), in that:

On February 19, 1998, Jane Doe I reported to a law enforcement Agency that she, while under the age of 14 years, was the victim of sexual crimes as specified in Penal Code Section as specified in Penal Code Section 803(g) to wit, 288;

The limitation period specified in Sections 800 and 801 has expired as to the charged crime;

The crime involved substantial sexual conduct as defined in Section 1203.066(b), to wit, oral copulation and vaginal penetration;

There is independent evidence that clearly and convincingly corroborates the allegations in Count One, to wit, the statement of another victim (Jane Doe II) alleging that she is a victim of similar crimes perpetrated by defendant as alleged in Count Two below.

COUNT TWO:

The Grand Jury of the County of Contra Costa further accuses MARION REYNOLDS STOGNER, Defendant, of the crime of felony, a Violation of PENAL CODE SECTION 288 (LEWD ACT UPON CHILD UNDER AGE 14), committed as follows:

On or about January 1, 1964 through September 27, 1973, at Antioch, in Contra Costa County, the Defendant, MARION REYNOLDS STOGNER, did willfully, lewdly, and unlawfully commit a lewd and lascivious act upon and with the body of Jane Done II, a child who was under the age of fourteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the Defendant and Jane Doe II.

JURISDICTIONAL ALLEGATION
STATUTE OF LIMITATIONS
MINOR SEXUAL ASSAULT CRIME

It is further alleged, that the crime alleged in Count Two above, can be prosecuted pursuant to Penal Code Section 803(g), in that:

On February 18, 1998, Jane Doe II reported to a law enforcement agency that she, while under the age of 14 years, was the victim of sexual crimes as specified in Penal Code Section 803(g), to wit, 288;

The limitation period specified in Sections 800 and 801 has expired as to the charged crime;

The crime involved substantial sexual conduct as defined in Section 1203.066(b), to wit, sodomy, vaginal penetration, and oral copulation;

There is independent evidence that clearly and convincingly corroborates the allegations in Count Two, to wit, the statement of another victim (Jane Doe I) alleging that she is a victim of similar crimes perpetrated by defendant as alleged in Count One, above.

GARY T. YANCEY
District Attorney

Dated: 3/13/01
at Martinez, California

JOHNC. COPE
Deputy
District
Attorney

* * * * *

A TRUE BILL

Dated: 3/13/01

at Martinez, California

_____
Foreman of the Grand Jury of the County of Contra Costa, State of California

* * * * *

Names of witnesses examined before the Grand Jury on finding the foregoing indictment:

1) MARGARET VAUGHN
2) CONNIE KILDARE
3) DETECTIVE CHRIS FORSYTH

APPENDIX E

SUPERIOR COURT OF CALIFORNIA,
MARTINEZ

DA: COPE CRIMINAL DEPT CALENDAR
PO: ANDERSSON 04/19//2001 8:30
PD: NAJERA 04/16/2001

JUDGE L. LINDENBAUM DEPARTMENT 031
16:16

CLERK CHERTKOW/MOYER
REPORTER: D. EASTRIDGE

NBR---DEFENDANT---CASE/DEFN---ROC---
ATTORNEY-TIME

---

034 STOGNER, MARION REYNOLDS 010398-6 01
MOTION 1:30
CUSTODIAL STATUS: OR

DOB: 06/13/1928 CHARGES: +PC 288(a)

DEMUR-RENEWED/TB
DEMURRER OVERRULED
REPORTER TO DO A TRANSCRIPT OF PREVIOUS RULING

SET: 05/01/01

APPENDIX F

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FIVE

FILED
MARION REYNOLDS STOGNER, **Court of Appeal-**
Petitioner **First App. Dist.**
AUG 28 2001 **RON D. BARROW, CLERK**

v. **BY** _____
DEPUTY

THE SUPERIOR COURT OF CONTRA COSTA COUNTY,
Respondent;

THE PEOPLE,
Real Party in Interest

Court of Appeal No. A094828
Contra Cost Co. Super. Ct. No. 010398-6

BY THE COURT:

On the court's own motion, the petition is deemed a petition for writ of mandate/prohibition.

The court has conducted a detailed review of the record and the parties' briefing regarding this petition. The court finds no merit to real party in interest's contention that the petition should be denied under the "abuse of the writ" doctrine. Based on the court's review of the merits of the petition, it

appears respondent superior court erred when it overruled petitioner's demurrer to the indictment.

In ruling on petitioner's demurrer, respondent was bound to follow authority holding that the limitations period of Penal Code[3] section 803, subdivision (g) ("section 803(g)") does not apply to an offense committed prior to January 1, 1985, if prosecution was barred on January 1, 1985 by the statute of limitations applicable prior to that date. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 454; *Lynch v. Superior Court* (1995) 33 Cal.App.4th 1223, 1228 ("*Lynch*"), review den., overruled on other grounds by *People v. Frazer* (1999) 21 Cal.4th 737 ("*Frazer*"); S 805.5, subd. (c)(1)("section 805.5(c)(1)").) In *Frazer*, the Supreme Court was not called upon to decide the particular question of statutory interpretation resolved in *Lynch* concerning the interplay between sections 803(g) and 805.5(c)(1); accordingly, *Lynch* remains binding authority on respondent. (See *People v. Saunders* (1993) 5 Cal.4th 580, 592, fn. 8["'an opinion is not authority for a proposition not therein considered'"].)

As a matter of statutory interpretation, section 805.5(c)(1) precludes application of section 803(g) where, as here, the statute of limitations for the underlying crimes expired prior to January 1, 1985. Contrary to real party in interest's suggestion, section 805.5 does not establish a limitations period, but instead defines the application of the chapter as a whole. Because sections 803(g) and 805.5 are capable of being harmonized, real party in interest's citation to the rule of statutory construction regarding general and special statutes is unavailing. Finally, nothing in the legislative histories of sections 803(g) and 805.5, of which this court takes judicial notice, reveals a

[3] All further statutory references are to the Penal Code.

legislative intent supporting real party in interest's interpretation of these sections. Indeed, although the Legislature was cognizant of *Lynch* and its statutory interpretation of sections 803(g) and 805.5(c)(1), it did not amend either statute in response to *Lynch*. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 897 [Legislature is presumed to be aware of existing decisions and to have acted in light of them].)

Therefore, let an alternate writ of mandate issue commanding respondent Contra Costa County Superior Court, in *People v. Stogner*, case No. 010398-6, to set aside and vacate its April 19, 2001 ruling overruling petitioner's demurrer to the indictment, and to enter a new and different order sustaining petitioner's demurrer without leave to amend; or , in the alternative, to appear and show cause before Division Five of this Court why a peremptory writ of mandate should not be granted.

If respondent superior court complies with this court's directive set forth above, and does so on or before September 21, 2001, the court will dissolve the stay previously imposed, discharge the alternate writ, and dismiss the petition as moot. On or before September 25, 2001, petitioner shall inform this court by letter whether respondent superior court has complied with the alternate writ, and serve and file any new orders issued by respondent.

Should respondent court choose not to follow the above procedure, but instead to appear and show cause before this court why a peremptory writ of mandate should not issue, this matter will be heard before Division Five when ordered on calendar.

The alternative writ is to be issued, served and filed on or before August 28, 2001, and shall be deemed served upon mailing by the clerk of this court

of copies of the alternate writ and this order to all parties in case No. 010398-6 and to respondent superior court.

A written return to the alternative writ shall be served and filed on or before October 2, 2001. If, however, respondent superior court complies with the alternative writ, and proof thereof is filed herein on or before that date, then no return need be filed, the alternative writ will be discharged, and the petition will be dismissed as moot.

Date AUGUST 28, 2001 JONES, P.J.

APPENDIX G

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MARION REYNOLDS STOGNER, A094828
Petitioner, (Contra Costa County Super. Ct. N. 010398-6)

V.

THE SUPERIOR COURT OF CONTRA COSTA COUNTY, Respondent;

THE PEOPLE,
Real Party in Interest.

In this proceeding, we revisit the question whether petitioner Marion Reynolds Stogner may be prosecuted for child molestations allegedly committed between 1955 and 1973. In an earlier decision, we concluded that prosecution was not barred by ex post facto or due process principles. *(People v. Stogner* (Oct. 14, 1999, A084772) [nonpub. Opn.].) Today we determine that prosecution is not precluded as a matter of statutory interpretation.

PROCEDURAL HISTORY

In April 1998, a criminal complaint was filed charging petitioner with two counts of a lewd act

upon a child Penal Code,[4] §288, subd. (a)) committed 25 to 43 years earlier. Count one alleged lewd conduct upon Jane Doe I between January 1, 1955, and September 30, 1964. Count two alleged lewd conduct upon Jane Doe II between January 1, 1967, and September 27, 1973. The complaint acknowledged on its face that the limitations period for the offenses had expired, but alleged that the charges could be prosecuted pursuant to section 803, subdivision (g) (hereafter § 803(g)).

* Pursuant to California Rules of Court, rules 976(b) and 976.I, parts II, III and IV of this opinion are not certified for publication.

Effective January 1, 1994, section 803(g) extended the limitations period for certain sex offenses to one year following a report to a law enforcement agency by a
person of any age that he or she has been the victim of sexual misconduct while under the age of 18.[5] Petitioner successfully demurred to the complaint on the ground that section 803(g) constitutes an ex post facto law, prohibited by the federal and state Constitutions. The district attorney then moved, unsuccessfully, in superior court to reinstate the complaint. On the People's appeal to this court, we reversed the trial court's order pursuant to the Supreme Court's holding in *People v. Frazer* (1999) 21 Cal.4th 737, that section 803(g) is not unconstitutional as an ex post facto law. *(People v. Stogner, supra,* A084772.)

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[4] All undesignated section references are to the Penal Code.

[5] Subdivision (f) of section 803, enacted in 1989, provides a one year period for prosecution of child molestation charges following a report by a child. Section 803(g), in contrast, covers victims who have reached adulthood.

The complaint was reinstated in superior court but subsequently dismissed on motion of the prosecutor because the prosecutor had obtained a grand jury indictment. That indictment, filed March 14, 2001, again charges petitioner with two counts of child molestation (subd. (a)) on two separate victims, Jane Doe I and Jane Doe II, allegedly committed between 1955 and 1964 and between 1964 and 1973, respectively. Again the indictment alleges that the charges may be prosecuted pursuant to section 803(g).

Petitioner demurred to the indictment, asserting, inter alia, that section 805.5 bars application of section 803(g) to this case. Petitioner now seeks relief from the trial court's order overruling his demurrer and allowing the case to proceed to trial. We issued an alternative writ of mandate and stayed the pending trial date. By issuing an alternative writ of mandate, we "necessarily determined that there is no adequate remedy in the ordinary course of law and that [this] case is a proper one for the exercise of our original jurisdiction. [Citations.]" *(Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 773, judg. vacated on other grounds (1971) 403 U.S. 915.)

DISCUSSION

I. STATUTE OF LIMITATIONS

At the time the offenses were allegedly committed (from 1955 to 1973), the statute of limitations specified a three-year period for prosecution of most felonies, including child molestation. (Former § 800, enacted by Stats. 1872; variously amended, as relevant here, from 1880 to 1972, repealed and replaced by § 800, Stats. 1984, ch. 1270, §§ 1, 2, p.4335.) Consequently, under the law

then in effect, prosecution of petitioner would have been barred after 1976.[6]

In 1984 the statutory scheme covering limitations periods (§ 799 et seq.) was repealed and replaced by a new statutory scheme, which increased the limitations period for some felonies. (Stats. 1984, ch. 1270, § 2, p. 4335 (the 1984 amendment).) The limitations period for child molestation, however, remained at six years from the date of commission. (§ 800.)

When the 1984 amendment was enacted, one of its provisions, section 806, subdivision (c)(1), provided that the new law was not applicable to offenses for which prosecution was already time-barred. In 1986, former section 806, subdivision (c) (1), was amended and renumbered as section 805.5. (Stats. 1986, ch. 248, § 161, p. 1264.)[7] As the California Law Revision Commission explained, "Subdivision (c)(1) limits

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[6] Effective January 1, 1981, the limitations period for a violation of section 288 was extended to five years (Stats.1980, ch. 1307, § 2, p. 4422.) On January 1, 1982, it was extended to six years. (Stats. 1981, ch. 1017, § 1.5, p. 3926; Stats. 1982, ch. 583, § 1, p. 2544.) Under the case law existing at the time, the limitations period could not constitutionally be extended once the initial period had expired. (*Sobiek v. Superior Court* (1972) 28 Cal.App.3d 846, 849-850, now disapproved by *People v. Frazer, supra*, 21 Cal.4th at p. 765.) Even if the extension had applied, of course, it would have been inconsequential; the limitations period would have expired as of 1979.

[7] Section 805.5 provides: "(a) As used in this section, 'operative date' means January 1, 1985. [¶] (b) Except as provided in subdivision (c), this chapter applies to an offense that was committed before, on, or after the operative date. [¶] (c) *This chapter does not apply, and the law applicable before the operative date does apply, to an offense that was committed before the operative date, if:* [¶] (1) *Prosecution for the offense would be barred on the operative date by the limitation of time applicable before the operative date.* [¶] (2) Prosecution for the offense was commenced before the operative date." (Italics added.)

retroactive application that would have the effect of lengthening the statute of limitation to reflect the constitutional *ex post facto* prohibition where the statute of limitation has already run on the operative date." (Recommendation Relating to Statutes of Limitation for Felonies (Jan. 1984) 17 Cal. Law Revision Com. Rep. (1984) p. 324, italics in original.) Consequently, in the present case, because the previously-set limitations period applicable to petitioner's offenses had expired in 1976 (or perhaps 1979), the statutory scheme adopted in 1984 would not have permitted prosecution of them.

Effective, January 1, 1994, section 803(g) extended the limitations period beyond six years for certain sexual offenses committed against minors so long as the prosecution commenced within one year following a report to law enforcement authorities by the victim. The crime must have involved "substantial sexual conduct," and the victim's allegation must be corroborated by independent evidence.[8]

In 1996, after several Court of Appeal decisions had declined to apply section 803(g) retroactively to cases where the applicable statute of limitations had

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[8] As originally enacted, section 803(g) provided in pertinent part: "Notwithstanding any other limitation of time described in this section, a criminal complaint may be filed within one year of the date of a report to a law enforcement agency by a person on any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 289, or 289.5. this subdivision shall apply only if both of the following occur: [I] (1) The limitation period specified in Section 800 or 801 has expired. [¶] I (2) the crime involved substantial sexual conduct...and there is independent evidence that clearly and convincingly corroborates the victim's allegation...."(Stats. 1993, ch. 390, § 1, p. 2226.)

In 1996 the statute was amended to change, among other things, the opening phrase of section 803(g) so that it now reads: "Notwithstanding any other limitation of time described in this *chapter*...." (Italics added.)

already expired, the Legislature amended section 803(g) to declare that "[t]his subdivision applies to a cause of action arising *before, on, or after January 1, 1994*, the effective date of this subdivision , and if the complaint is filed within the time period specified in this subdivision, *it shall revive any cause of action barred by Section 800 or 801.*" (Stats. 1996, ch. 130, § 1 (the 1996 amendment) [Assem. Bill No. 2014, adding § 803(g)(3)(A)], italics added.)[9] As the Legislative Counsel's digest explained, the 1996 amendment makes the one-year time limitation "apply to a cause of action arising before, on, or after the effective date..., thereby reviving and extending already expired statute of limitations periods." (Legis. Counsel's Dig., Assem. Bill No. 2014 (1995-1996 Reg. Sess.) Thus, when the Legislature amended section 803(g) in 1996, it viewed the ex post facto issue far differently from the way it had in 1984, when the predecessor to section 805.5 was enacted: revival of an expired limitations period was not considered unconstitutional.

Section 803(g) was further amended in 1997, but the changes do not affect our analysis here. (Stats. 1997, ch. 29, § 1.) It bears noting, however, that the amendment left intact the language allowing criminal charges to be filed in cases that were time-barred before 1994. (See generally *People v. Frazer, supra*, 21 Cal.4th at pp. 747-749.)

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[9] Before the 1996 amendment to section 803(g), the Supreme Court had granted review in five cases on the issue whether section 803(g) applied when the limitations period had already run. (*People v. Maloy* (S049313); *People v. King* (S05641 1); *People v. Sowers* (S051278); *People v. Richard G.* (S047826); *People v. Regules* (So48880).) On April 24, 1997, the Supreme Court dismissed review in all those cases in light of the legislative amendment. (See *People v. Frazer, supra*, 21 Cal.4th at pp. 745-746, fns. 5, 6, & 8.)

The Attorney General's request for judicial notice of the orders dismissing review is unnecessary and accordingly denied.

The question before us is whether the Legislature's expressed intent to apply section 803(g) to offenses committed before January 1, 1994, and to "revive any cause of action barred by Section 800 or 801" operates to allow prosecution of petitioner for the offenses committed between 1955 and 1973. We conclude that it does.

We begin our analysis with *People v. Frazer*, in which the Supreme Court examined whether section 803(g) applies when the statute of limitations had expired before the effective date of section 803(g), January 1, 1994. In *Frazer*, the crimes were allegedly committed in 1984 and the statute of limitations had expired in 1990, but the parties did not dispute that section 803(g) applied. Nevertheless, the court discussed in some detail the application of the statute. We quote pertinent portions of the court's analysis: "At no point has section 803(g) restricted the amount of time that may pass between commission of the crime and commencement of the prosecution....[¶]...[¶] [N]othing in section 803(g) provides that the crime must be committed, or that the limitations period in section 800 or 801 must expire, *after* January 1, 1994, in order for the extended one-year period to apply. The 1996 amendment left no doubt that section 803(g) applies even where the existing statute of limitations expired before January 1, 1994. [¶]...[T]he Legislature was highly familiar with the various Court of Appeal opinions filed in 1995 and 1996 that declined to apply section 803(g) where 'the previously applicable statute of limitations had expired prior to January 1, 1994, (the effective date of Section 803(g),' (Assem. Floor Anaylsis, Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 21, 1996, p. 1.) The legislative record identified these Court of Appeal decisions by name and original published citation, and summarized the statutory and constitutional

analysis each used to reach this conclusion. *(Id.* at pp. 1-2; Sen. Com. On Crim. Procedure, Analysis of Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 7-9.) [¶] According to the legislative record, the primary reason for amending section 803(g) in 1996 was to repudiate these Court of Appeal decisions insofar as they had construed the statute in such a restrictive manner. The 1996 amendment sought to 'clarify,' through express 'retroactivity' and 'revival' provisions, that section 803(g) permitted charges to be filed within one year of the victim's report, even where prosecution of the crime was otherwise time-barred before January 1, 1994. (Sen. Com. Crim. Procedure, Analysis of Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 57; Sen. Floor Analysis, Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 2-4.) [¶]....[¶] Thus, consistent with allegations in the complaint, section 803(g) serves as an exception to section 800 in the present case." *(People v. Frazer, supra,* 21 Cal.4th at pp. 752-753, italics in original.)

The court then went on to consider the constitutionality of such a broad extension of the statute of limitations, and the court concluded that section 803(g) is not an ex post facto law insofar as it applies to cases for which the statute of limitations had already expired. *(People v. Frazier, supra,* 21 Cal.4th at pp. 754-765.)

In the case before us, the statute of limitations had expired not only prior to the enactment of section 803(g) but even prior to the enactment of the entire chapter (ch. 2, tit. 3, pt. 2) of the Penal Code in which section 803(g) sits. Petitioner argues that section 803(g) cannot be applied to him because section 805.5, subdivision (c)(1), makes the entire chapter inapplicable to crimes for which the statute of limitations expired before January 1, 1985. We must

decide whether, properly interpreted, section 803(g) is an exception to section 805.5 or governed by it.

In construing section 803(g), we are guided by familiar rules of statutory interpretation. "The primary duty of a court when interpreting a statute is to give effect to the intent of the Legislature, so as to effectuated the purpose of the law. [Citation.] To determine intent, courts turn first to the words themselves, giving them their ordinary and generally accepted meaning. [Citation.] If the language permits more than one reasonable interpretation, the court then looks to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, and the statutory scheme of which the statute is a part. [Citation.] ...Ultimately, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and it must avoid an interpretation leading to absurd consequences. [Citation.]" *(In re Luke W.* (2001) 88 Cal.App.4th 650, 655.)

The opening phrase in section 803(g) seems designed to make it an exception to other provisions in the same chapter, including section 805.5: "Notwithstanding any other limitation of time described in this chapter...." (§ 803 (g)(1).) Petitioner, however, argues that the opening phrase of section 803(g) does not refer to section 805.5, because the latter does not describe a limitations period; it merely addresses the applicability and operative date of the chapter. We decline to make such a fine distinction. Section 805.5, subdivision (c)(1), states that, as to offenses for which prosecution is time-barred by the limitations periods applicable before January 1, 1985, the previous limitations periods apply. (See fn. 5, *ante.*) Section 803(g), in turn, sets a one-year-from-

date-of-report limitations periods, even those limitations periods referred to in section 805.5 that had expired before January 1, 1985.

Even if petitioner's interpretation of the initial clause in section 803(g) is reasonable, we believe that the Legislature intended to eliminate all constraints on the effect of section 803(g), except those contained in that subdivision. Section 803(g) was obviously designed to preclude child molesters from escaping punishment merely because the molestation was revealed after the victim became and adult and after the Limitations period had elapsed. Certainly the Legislature was aware that children who are the victims of sex crimes often cannot recognize or effectively assert their victimization until they have reached adulthood. Moreover, victims of sex crimes may be more likely to delay reporting because they are afraid of reprisals or fearful that they will not be believed. The legislative purpose behind section 803(g) was to prevent sex offenders from 'reaping the benefits of their victim's immaturity and psychological trauma, and the legislative history plainly indicate that section 803(g) was intended to create an exception to the statutes of limitations. (See, e.g., Assem. Com. On Pub. Safety, Analysis of Assem. Bill No. 290 (1993-1994 Reg. Sess.) Apr. 13, 1993, pp. 2-3; Sen. Com. On Judiciary, Analysis of Assem. Bill No. 290 (1993-1994 Reg. Sess.) July 13, 1993, pp. 2-3.)

Furthermore, the 1996 amendment to section 803(g) was intended to maximize the impact of the statute by ensuring that the prosecution's ability to file charges is "revive[d]" regardless of the passage of time between the commission of the crime and the commencement of prosecution, as long as the charges are filed within one year of the victim's report. "Sex crimes committed against children are the most heinous of offenses. Unfortunately, many don't bring

the crime to the attention [of] law enforcement until many years later, when the statute of limitations has already expired. Children become double victims-first victimized by the perpetrator and again by the judicial system. This measure will *guarantee* them their day in court." (Assem. Com. On Pub. Safety, Analysis of Assem. Bill. No. 2014 (1995-1996 Reg. Sess.) Apr. 9, p.1 [according to the author], italics added.)

The Legislature intended to override the Court of Appeal decisions that had refused to apply section 803(g) retroactively to crimes for which the statute of limitations had expired. *(People v. Frazer, supra*, 21 Cal.4th at pp. 752-753.) There is no hint in the legislative history that less than complete retroactivity was intended, so long as charges were filed within one year of the victim's report. Yet petitioner's interpretation of sections 803(g) and 805.5 would accomplish a significant constraint. We reject it.

We recognize that in *Lynch v. Superior Court* (1995) 33 Cal.Appl4th 1223, 1228, disapproved on the ex post facto issue in *People v. Frazer, supra*, 21 Cal.4th at page 765, the court took a contrary view and concluded that section 805.5, subdivision ©(1), makes section 803(g) inapplicable to crimes for which the statute of limitations had expired as of January 1, 1985. However, the court's discussion was cursory and did not address the precise points presented in the briefing before us. Furthermore, as the Supreme Court noted in *Frazer*, the Legislature's primary reason for amending section 803(g) in 1996 was to repudiate certain Court of Appeal decisions that had declined to apply the statute retroactively. *(People v. Frazer, supra*, at p. 753.) Among those decisions identified by the Legislature was *Lynch v. Superior Court, supra*, 33 Cal.App.4th 1223, which was described as holding "that application of section 803(g)...violated constitutional ex post facto principles,

and is prohibited as a matter of statutory construction in light of Penal Code Section 805.5...." (Assem. Com. On Pub. Safety, Analysis of Assem. Bill No. 2014 (1995-1996 Reg. Sess.) Apr. 9, 1996, p. 2.) The language of the 1996 amendment to section 803(g), added as a response to and a repudiation of *Lynch*, providing that the subdivision applies even to offenses committed before January 1, 1994, and that the subdivision "shall revive any cause of action barred by Section 800 or 801" (§ 803(g)(3)(A)), could not be more explicit in reflecting the Legislature's intent to override the existing limitations periods for those offenses for which prosecution is time-barred.

In light of the evident legislative purpose, we construe the beginning phrase of section 803(g)-"[n]otwithstanding any other limitation of time described in this chapter"-to reflect an intent to supersede section 805.5 insofar as it affects limitations periods. Although we are cognizant of the principle that statutes should be read in harmony with each other whenever possible, we cannot accept petitioner's argument that section 803(g) should be read as subordinate to section 805.5. In our view, section 803(g) creates an exception to section 805.5 and is not controlled by it.

Finally, interpreting the relationship between sections 803(g) and 805.5 as petitioner suggests would serve no apparent legislative purpose. As noted above, when originally enacted as part of a package of statutes, section 805.5 served the Legislature's goal of avoiding a conflict with the ex post facto clause by precluding prosecution of any offense for which the statutory period had run. With the enactment of section 803(g), however, the Legislature's goal changed, and section 805.5 played no role in the efforts to extend the limitations periods and revive

molestation charges that would otherwise be time-barred.[10]

In any event, even under petitioner's view that section 805.5 governs the application of section 803(g), section 805.5 would not affect all prosecutions equally. Section 805.5 would bar prosecution of any molestation that was already time-barred as of January 1, 1985, i.e., one that was committed prior to January 1, 1979, more than six years before the chapter's operative date. But section 805.5 would have no effect on offenses committed after January 1, 1979; the charges would be revived by section 803(g). Thus, under petitioner's interpretation, a complaint filed in 1994, after section 803(g) took effect, could have properly charged an offense committed in 1979, a then 15-year-old offense, but not one committed in 1978.[11] A complaint filed in 2001 could likewise charge a molestation which occurred in 1979, now 22 years after the fact. In 2009, a 30-year-old offense could be prosecuted. Petitioner's interpretation of section 805.5 would impose a limitations period based simply on the date of the occurrence of the offense-a factor unrelated to the traditional reasons for limitations periods.

In crafting an appropriate length of a limitations period, the Legislature balances competing interests. On the one hand, a statute of limitations protects an accused from the consequences of charges

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[10] The operative date of section 805.5 is January 1, 1985. When enacted, section 805.5 applied to a chapter that did not include section 803(g). Given the specificity of section 805.5 regarding its operative date, we read it as applying to the chapter enacted in conjunction with it and not to subsequent legislation.

[11] This is true because a three-year statute of limitations applied to molestation offenses committed in 1978 and 1979. That period was lengthened to five years, effective January 1, 1982. (See fn.3, *ante*.) The 1978 offense was, therefore, time-barred before the effective date of section 805.5, while the 1979 offense was not.

grown stale with age: unreliable memories, dead or missing witnesses, and lost or contaminated physical evidence. (Recommendation Relating to Statutes of Limitation for Felonies (Jan. 1984) 17 Cal.Law Revision Com. Rep., *supra*, p. 308.) At the same time, the Legislature also considers the nature and seriousness of the offense.[12] Section 803(g) reflects a reasonable legislative concern for certain crimes where delayed reporting is common and serves to revive otherwise time-barred charges for a brief period after the victim's report is made. We can discern to logical reason why the Legislature would retain a limitations period based not on the age of the offense, but on its date of occurrence. We do not believe the Legislature intended this result, and we refuse to impose it.[13]

We recognize, of course, that the effect of our holding today is to make possible the prosecution of offenses reaching far back in time. We observe, however, that the express requirement in section 803(g) for a greater quantum of evidence provides

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[12] Some offenses may be prosecuted at any time without regard to a limitations period. (§ 799.) Other offenses must be prosecuted within the prescribed limitations period, but the limitation period does not commence to run until the offense was discovered. (§803, subds. (c) & (e).)

[13] In light of our conclusion, we summarily reject petitioner's argument that section 803(g) revives only causes of action "barred by Section 800 or 801" and that this language must refer only to the version of sections 800 and 801 in effect when section 803(g) took effect (Jan. 1, 1994), not the version that had been repealed when the predecessor to section 805.5 took effect (Jan.1, 1985). This argument presumes that section 805.5, subdivision (c)(1), controls, but we have rejected that premise. In any event, the language of section 803(g) upon which petitioner relies seems to have been included in the statute solely to clarify that the one-year-from-date-of-report limitations period extends the time for prosecution and does not cut short the longer periods provided in sections 800 and 801.

*See footnote, *ante*, page 1.

some protection against the erosion of memories and evidence caused by the passage of time.

II. EX POST FACTO LAW*

Petitioner contends that *People v. Frazer*, *supra*, 21 Cal.4th 737, was wrongly decided and that the flaws in the California Supreme Court's reasoning are made apparent by the subsequent decision of the United States Supreme Court in *Carmell v. Texas* (2000) 529 U.S. 513. (See generally *In re Melvin J.* (2000) 81 Cal.App.4th 742, 758, fn. 7 [recognizing the erroneous analysis].) We are, of course, bound to follow our Supreme Court's decision in *Frazer*, and we leave it to that court to decide whether *Frazer* should be reexamined. In any event, we note that even after its decision in *Carmell*, the United States Supreme Court declined to review *Frazer*. *(People v. Frazer, supra*,21 Cal.4th *737*, cert. Denied (2000) 529 U.S. 1008, rhrg. Denied (2000) 530 U.S. 1284.)

III. DUE PROCESS*

Petitioner contends that prosecuting him for offenses for which the statute of limitations had expired would violate due process protections. An identical argument was rejected in *People v. Frazer*, *supra*, 21 Cal.4th at pages 765-775. Although the court held that a claim of *procedural* due process violation was not yet ripe for adjudication, see footnote, *ante*, page 1, the court concluded "there is no basis on which to facially invalidate section 803(g), either on the ground it's on-year limitations period leads to excessive charging delays, or on the ground section 80-3(g) applies even where the six-year period in section 800 'has expired.'" *(People v. Frazer, supra*, at p. 775, fn. Omitted.)

Following *Frazer*, in the appeal in petitioner's case, we recognized the possibility of a due process claim based upon the lengthy delay between the commission of the offenses and the filing of criminal charges. However, as in *Frazer*, we concluded that such a claim is not yet ripe for adjudication: "[D]efendant's constitutional claim was addressed below on demurrer, and we have no information about the particular circumstances of the case. Whether precomplaint delay is unjustified and prejudicial is a question of fact for the trial court. *(People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911-912.) Accordingly, we will leave it to the trial court to examine *in an appropriate proceeding* the reasons for the 25-to-43-year delay and the resulting damage to defendant's ability to refute the charges." *People v. Stogner, supra*, A084772, at p. 3; italics added.)

Once again, this issue comes to us after a ruling on demurrer, with no factual record developed on whether it would be fundamentally unfair to require petitioner to stand trial. Again we leave the matter for an appropriate proceeding in the trial court.

IV. SEPARATION OF POWERS*

Petitioner argues that section 803(g) is unconstitutional in that it violates the separation of powers doctrine by allowing the victim to control when charges will be brought. The argument is wholly meritless.

In virtually all criminal prosecutions victims make important decisions that may affect the ability of the prosecutor to successfully bring charges. Such decisionmaking has no powers doctrine prohibits one branch of government from infringing upon the

powers of another. [14] The victim of a crime is not a state officer charged with the exercise of either legislative, executive or judicial power.

Petitioner's argument rests upon the basic notions that the prosecutor has sole responsibility for prosecuting criminal offenses and a private citizen has no standing to compel the prosecutor to act. *(Dix v. Superior Court* (1991) 53 Cal.3d 442, 451; *Taliaferro v. Locke* (1960) 182 Cal.App.2d 752, 757.) Those principles have no application here. The authority of the public prosecutor is not impaired by section 803(g). The prosecutor retains sole discretion to determine whether to file charges, whom to charge, what charges to file, and what punishment to seek.

DISPOSITION

The alternative writ is discharged, the stay is lifted, and the petition is denied.

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SIMONS, J.

We concur.

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JONES, P.J.

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STEVENS, J.

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[14] Article 111, section 3, of the California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted in this Constitution."

APPENDIX H

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 5

MARION REYNOLDS STOGNER,
Petitioner,

v.

THE SUPERIOR COURT
OF CONTRA COSTA COUNTY
Respondent;
THE PEOPLE,
Real Party in Interest

A094828
Contra Costa County No. 0103986

BY THE COURT:

The petition for rehearing is denied.

Date: December 17, 2001 JONES, P.J.

APPENDIX I

Court of Appeal, First Appellate District,
Division Five – No. A094828
S103297

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARION REYNOLDS STOGNER, Petitioner,

v.

SUPERIOR COURT OF CONTRA COSTA COUNTY,
Respondent;

THE PEOPLE, Real Party in Interest

Petition for review DENIED.

Supreme Court
FILED
February 27, 2002
Frederick K. Olrich, Clerk
Deputy

GEORGE
Chief Justice

APPENDIX J

California Penal Code Section 288(a):

Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

APPENDIX K

California Penal Code Section 800:

An indictment for any other felony than murder, the embezzlement of public money, or the falsification of public records, must be found, or an information filed, within three years after its commission.

APPENDIX L

California Penal Code Section 803(g):

Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5.

(1) This subdivision applies only if both of the following occur:

(A) The limitation period specified in Section 800 or 801 has expired.

(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals.

(3)(A) This subdivision applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if any of the following occurred or occurs:

(i) The complaint or indictment was filed on or before January 1, 1997, and it was filed within the time period specified in this subdivision.

(ii) The complaint or indictment is or was filed subsequent to January 1, 1997, and it is or was filed within the time period specified within this subdivision.

(iii) The victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was not filed within the time period specified in this subdivision, but a complaint or indictment is filed no later than 180 days after the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of this subdivision is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first.

(iv) The victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was filed within the time period specified in this subdivision, but the indictment, complaint, or subsequently filed information was dismissed, but a new complaint or indictment is filed no later than 180 days after the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of this subdivision is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first.

(B)(i) If the victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was filed within the time period specified in this subdivision, but the indictment, complaint, or subsequently filed information was dismissed, a new complaint or

indictment may be filed notwithstanding any other provision of law, including, but not limited to, subdivision (c) of Section 871.5 and subdivision (b) of Section 1238.

(ii) An order dismissing an action filed under this subdivision, which is entered or becomes effective at any time prior to 180 days after the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of this section is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision s constitutional, whichever occurs first, shall not be considered an order terminating an action within the meaning of Section 1387.

(iii) Any ruling regarding the retroactivity of this subdivision or its constitutionality made in the course of the previous proceeding, by any trial court or any intermediate appellate court, shall not be binding upon refiling.

Supreme Court, U.S
FILED
JAN 16 2003

(7)

No. 01-1757

In The Supreme Court of the United States

MARION REYNOLDS STOGNER, Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED (Rule 14.1 (a))

1. Did the California Legislature's abolition of the Statute of Limitations requirement, which historically comprised an element of the crimes charged, so as to charge Petitioner retroactively, violate the *Ex Post Facto* Clause?

2. Did the California Legislature's abolition of the Statute of Limitations arbitrarily retract a liberty interest the state had conferred on Petitioner?

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OPINION BELOW (Rule 14.1(d))

The opinion of the California Court of Appeal, First Appellate District, which is the subject of this petition, was reported at 93 Cal.App.4th 1229 (2001). It appears in Appendix G. The California Supreme Court's order of February 27, 2002, denying discretionary review is attached as Appendix I. There is no written decision of the respondent Superior Court.

JURISDICTIONAL STATEMENT

The judgment of the California Court of Appeal to be reviewed was filed on November 21, 2001. (App. G, 19.) The California Supreme Court denied discretionary review on February 27, 2002. (App. I, 37.) The petition was filed pursuant to Rule 13.1 within 90 days of that date and was subsequently granted on December 2, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND CALIFORNIA PENAL CODE STATUTES INVOLVED

The United States Constitution, Article I, section 10, clause 1, provides: "No State shall ... pass any ... Ex Post Facto Law..." (U.S. CONST. Art. I, § 10, cl. 1).

The United States Constitution, Amendment XIV, states: "No State shall ... deprive any person of life, liberty, or property, with out due process of law..." (U.S. CONST. Amend. XIV).

Penal Code Section 288(a). (CAL. PEN. CODE § 288(a) (West 1999) (App. J, 38).

Penal Code Section 800. (CAL. PEN. CODE § 800 (West 1985 & Supp. 2002) (App. K, 39).

Penal Code Section 803(g). (CAL. PEN. CODE § 803(g) (West 1985 & Supp. 2002) (App. L, 40).

STATEMENT OF THE CASE

In April 1998, a complaint was filed charging Petitioner with two counts of a lewd act upon a child under California Penal Code section 288(a), (App. J, 38), alleged to have been committed 25 to 43 years earlier. (App. A, 1.) The complaint acknowledged on its face that the limitations period for the offenses had expired, but alleged that the charges could be prosecuted pursuant to Penal Code section 803(g) (App. L, 40.)[1]

Petitioner successfully demurred to the complaint on the ground, *inter alia*, that section 803(g) constituted an *ex post facto* law. The district attorney moved, unsuccessfully, in superior court to reinstate the complaint. On the State's appeal[2], the California Appeals Court reversed pursuant to the California Supreme Court's holding in *People v. Frazer*, 21 Cal.4th 737 (1999), that Penal Code section 803(g) was not unconstitutional. *People v. Stogner*, No. A084772 (Cal.App. Oct. 4, 1999). (App. B, 5.)

This Court denied discretionary review. *Stogner v. California*, No. 99-8895 (Oct. 2, 2000) (App. C, 9.) However, at the time of the denial, no California court had adjudicated Petitioner's 805.5[3] claim, nor had they

[1] Effective January 1, 1994, section 803(g) created a new one year limitations period for certain sex offenses, following a report to a law enforcement agency by a person of any age that he or she has been the victim of sexual misconduct while under the age of 18. It applies only to such causes of action already barred by Limitation.

[2] The original demurrer raised the Statutory bar under Penal Code 805.5, but it was not litigated under the State's Appeal.

[3] Penal Code Section 805.5 provides:

(a) As used in this section, "operative date" means January 1, 1985.

(b) Except as provided in subdivision (c), this chapter applies to an offense that was committed before, on, or after the operative date.

evaluated his Constitutional claims in light of *Carmell v. Texas*, 529 U.S. 513 (2000).

The complaint was reinstated in superior court but subsequently dismissed when the prosecutor filed an indictment. (App. B, 5.) That indictment, filed March 14, 2001, again charges Petitioner with two counts of molestation as against Jane Doe I and Jane Doe II, alleging conduct between 1955 and 1964 and between 1964 and 1973, respectively. (App. D, 10.) Again the indictment alleged that the charges could be prosecuted under section 803(g).

Petitioner demurred, asserting that no cause of action was stated, and the court lacked jurisdiction. The demurrer raised *ex post facto* and due process violations, and alleged that section 805.5 barred application of section 803(g). (App. E, 14.) Upon denial of the demurrer, Petitioner filed a writ of prohibition. The Court of Appeals granted an Alternate Writ on the grounds that Petitioner had no other adequate remedy at law, but in it's published opinion ultimately ruled against him. (App. F, 15); *see also Stogner v. Superior Court*, 93 Cal.App.4th 1229 (2001) (App. A, 1.) A request for rehearing was denied. (App. H, 36.) The California Supreme Court denied discretionary review. (App. I, 37.)

(c) This chapter does not apply, and the law applicable before the operative date does apply, to an offense that was committed before the operative date, if:

(1) Prosecution for the offense would be barred on the operative date by the limitation of time applicable before the operative date.

(2) Prosecution for the offense was commenced before the operative date.

(CAL. PEN. CODE § 805.5) (West 1985 & Supp. 2002)

SUMMARY OF THE ARGUMENT

(Rules 10, 14.1 (h))

The State's retroactive actions violate the *Ex Post Facto* and Due Process Clauses and all sense of fairness and finality contained therein. The State's claim of power to legislate retroactively is against the nature of criminal Statutes of Limitations.[4] In California the Statute is a basic and required element and ingredient of the prosecution's case. The State circumvents its inability to overcome the law by altering it after the fact. The California courts, through their decisions in *Frazer* and *Stogner* have upheld these laws in a manner which retroactively vests jurisdiction, cedes power to the State to Prosecute, forfeits Petitioner's rights and creates a new cause of action to punish Petitioner.

California has created, through its enactment of Statutes of Limitation, a tripartite right of absolute finality in Petitioner's favor. Where applicable[5] this rule confers a substantive right upon the people. *See People v. Williams*, 21 Cal.4th 335, 339 (1999); *People v. Chadd*, 28 Cal.3d 739, 758 (1981); *People v. Zamora*, 18 Cal.3d 538, 547 (1976). It places an absolute limit on the State's ability to prosecute by terminating liability and denies punishment. *Zamora*, 18 Cal.3d at 547. It bars California's courts from exercising fundamental jurisdiction over the subject and the subject matter. *See People v. Williams*, 21 Cal.4th 335, 340, 347 (1999); *People v. McGee*, 1 Cal.2d 611, 613 (1934).

Although California created this rule, it now seeks to destroy it. California seeks to retroactively strip Petitioner of this right and inject new elements into an

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[4] *People v. Frazer*, 21 Cal.4th 737, 777 (1999) (Kennard, J. dissenting).

[5] California has created Limitations Statutes for most, but not all crimes, at all times relevant herein the limitations period was three years; *see also* CAL. PEN. CODE § 800. (App. K, 39.)

expired cause of action in order to prosecute Petitioner, by Indictment for conduct barred by the Statute of Limitations for over twenty-five years.

Based on California Penal Code § 803(g), the State claims that the scourge of child molestation legislatively compels and constitutionally permits the retroactive forfeiture of Petitioner's right consistently ruled not subject to forfeiture. *See People v. Williams*, 21 Cal.4th 335 (1999); *People v. McGee*, 1 Cal.2d 611 (1934); *People v. Hoffman*, 132 Cal.App. 60 (1933); *but see People v. Frazer*, 21 Cal.4th 737 (1999). It claims the power to destroy a rule of law effectively in place since the State's foundation. *See Frazer* at 743. It has rewritten its own rules[6] to retroactively cast out Petitioner from legislation designed through Penal Code section 805.5 to specifically reaffirm his particular right.

This Writ requests this Court to determine whether rights, so ingrained in American jurisprudence as to be deemed irrevocable, can be retroactively revoked without violating the dictates of the United States Constitution. For if California is successful in depriving Petitioner of this right in this situation, then such right has effectively been destroyed for all persons the States may choose to prosecute, no matter how distant in time and memory the conduct may be. No matter how long the State has promised otherwise. No matter how final the rule has been expressed to be.

It is therefore respectfully requested that the matter be fully and fairly adjudicated under established

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[6] In 1985 the California Legislature overhauled the entire Statute of Limitations scheme. For crimes barred by the limitations in effect prior to the enactment date of this legislation, the prior Statutes of Limitation were preserved and specifically exempted from the new legislation. The First District Court of Appeal ruled that this exemption was excepted by passage of Penal Code §803(g). (App. G, 19.)

principles of due process, *ex post facto*, fairness and finality that have guided all citizens, the states, and the courts under the United States Constitution.

A. Issue One: Ex Post Facto

The State has retroactively redefined the material ingredients of the offense, altered the rules of evidence, disregarded the significance of ultimate facts and enlarged the crimes thereunder, seeking punishment where none could be had. Petitioner asserts that he is entitled to rely on the Statute of Limitations, complete since 1976, that California is attempting to revoke retroactively. Petitioner asserts these actions violate each of the *Calder* categories under the *Ex Post Facto* Clause.

B. Issue Two: Due Process

The State attempts to revoke a right, which the State's Highest Court continues to assert is substantive, belongs to Petitioner, and cannot be forfeited. Petitioner requests that this Court find the State does so in violation of the *Due Process* Clause. The Fifth and Fourteenth Amendments of the United States Constitution guarantee the principle that no person will be deprived of life, liberty or property without due process of law. Stripping the completed defense of the Statute of Limitations from Petitioner deprives him of a State guaranteed ability to regain his freedom. Having deprived him of the mechanism that compelled the courts to enjoin the State from infringing on his liberty any further, he must still face a trial that California and this Court have agreed is conclusively and presumptively unfair. *See United States v. Marion*, 404 U.S. 307, 322 (1971); *People v. Zamora*, 18 Cal.3d 538 (1976).

ARGUMENT

A. Ex Post Facto

As a necessary defense against the government, the Framers twice placed the *Ex Post Facto* Clause in the United States Constitution. So important were its terms that it was necessary to include it as a prohibition not only against the federal government (U.S. CONST. Art. 1, § 9) but the individual states as well (U.S. CONST. Art.1, § 10).[7] It is an express restraint upon the power of the state and federal legislatures that prohibits arbitrary or vindictive retroactive legislation. *See Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). It also serves to prevent the lack of fairness and notice inherent in retroactive punitive measures. *See Weaver v. Graham*, 450 U.S. 24, 28-9 (1981)[8]; *Carmell v. Texas*, 529 U.S. 513, 532-33 (2000); *Miller v. Florida*, 482 U.S. 423, 429-30 (1987).

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[7] Chief Justice Marshall traced the restriction upon legislative power to various provisions of the United States Constitution, "Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State." *Cummings v. Missouri*, 71 U.S. 277, 322 (1866) quoting *Fletcher v. Peck*, 10 U.S. 87, 138 (1810).

[8] "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature it violates the Clause if it is both retrospective and more onerous..." *Weaver*, 450 U.S. at 30-31.

The seminal case defining the *Ex Post Facto* Clause, articulated the history and purpose of that term. *See Calder v. Bull*, 3 U.S. 386 (1798). As Justice Chase stated, "I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control...." *Id.* at 387-88. Thus the substantial protections of the *Ex Post Facto* Clause were designed exclusively as "additional bulwark[s] in favour of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation." *Id.* at 390.

In reaching its decision, the *Calder* Court illuminated the types[9] of retrospective legislative action that would violate the proscription. *Id.* at 390. Justice Chase in particular articulated four categories that today control determinations of whether retrospective penal legislation is constitutional or not.[10] *See Carmell*, 529 U.S. at 522-6.

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[9] These categories were conceived from experience with the legislative despotism exercised by England, which the Framers sought to negate with the *ex post facto* restraint on legislative power. *See Calder*, 3 U.S at 389.

[10] The categories are:

> 1st Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder, 3 U.S. at 390.

In defining the *Ex Post Facto* Clause, the *Calder* Court understood that not every retroactive law was impermissible. *Id.* at 391. Thus the Court approved of subsequent laws that might pardon an offender, or otherwise forgive him. *Id.* These laws were retrospective and penal, but not impermissible because they ameliorated the consequences for the particular offender. *Id.* As Justice Chase noted: "There is a great and apparent difference between making an UNLAWFUL act LAWFUL; and making an innocent action criminal and punishing it as a CRIME." *Id.*

Rather, "the restriction not to pass any *ex post facto* law, was to secure the person of the subject from inquiry, or punishment, in consequence of such law." *Calder v. Bull*, 3 U.S. 386, 390 (1798). Because 803(g) operates after the fact on events predating it, it is retrospective. Because it seeks only to ensnare and punish those persons who would otherwise be beyond prosecution, it is penal and cannot be seen as ameliorative. It is an *ex post facto* law, which within the *Calder* definitions violates the Constitution of the United States.

Calder Category One

The classic understanding of *Calder* one occurs "when after an action, indifferent in itself, is committed, the legislator, then, for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it." *Calder*, 3 U.S. at 396 (Paterson, J., citing 1 William Blackstone, Commentaries *46.) However this is not the only scenario by which an *ex post facto* law might operate against prior conduct completed before the passage of such laws. The Statute of Limitations' role analyzed through category one has two separate and distinct functions. First, by the passage of the requisite time, the Statute of Limitations acts as an operation of law to change the legal consequences of certain acts committed beforehand.

Such a change in consequences was fixed in law and time prior to the passage of 803(g) and discharged criminal liability and punishment for the allegations at issue.

Second, once time runs, the Statute of Limitations retains all of its characteristics as a defense to the criminal charges and when asserted defeats the State's prosecution. If 803(g) retroactively acts upon either of these qualities of the completed bar to the Petitioner's detriment, it violates *ex post facto*.

Statute of Limitations as an Operation of Law

An act, whether wrongful or not, may not acquire all or even certain legal significance until another act occurs. For clarity's sake, the initial act will be deemed the primary act and the event following, the secondary act.

Existing law may operate upon a secondary act so as to cause it to change the legal consequences of the primary acts antecedent to it. Thus a secondary act may pardon, grant amnesty, or otherwise divest or lessen the criminality or punishment, which might have attached to the first act alone, *if not for the passage of the secondary act*. Similarly, the reverse may be true: a secondary act may enlarge the significance of the first, or now cause it to be criminal.[11] If the laws controlling both events exist by

[11] The crime of conspiracy is the classic example; requiring not only the primary act (the agreement), but a secondary or "overt act" to make the conduct criminal. "No agreement amounts to a conspiracy unless an overt act be done to effect the object thereof, and the pleading and proof of such an act is necessary to constitute the offense. The overt act marks the commission of the crime and fastens criminal liability upon the conspirators, the period of limitations must be deemed to begin running at that time; and where, as here, the conspiracy as charged is a continuing one, the period begins to run with the commission of

the time both acts are completed, then no *ex post facto* violations occur. It is only where subsequent to the completed acts, a law is passed which seeks to alter their legal significance, that the retrospective legislation, if detrimental to the individual, is *ex post facto*.[12]

The legal significance of 803(g) is that it retroactively operates after a secondary act that was in place prior to 803(g), and which had, by operation of law already affected the primary acts preceding it. In this case, Petitioner's continued presence in California through September 1976 was the secondary act which

the last overt act alleged. *See People v. Crosby*, 58 Cal.2d 713, 728 (1962). Similarly, *Zamora* which traced the history of both the California and federal rule noting that it was neither the completed object that made the conspiracy (e.g., the related substantive offense), nor the agreement itself, finding that the requirement of an overt act to provide a "*locus penitentiae* – an opportunity to reconsider, terminate the agreement, and thereby avoid punishment for the conspiracy." *People v. Zamora*, 18 Cal.3d 538, 549 n. 8 (1977) (citations omitted.)

Consider also, manslaughter: "In this state, the law makes the crime of manslaughter a composite one. The striking of the victim does not alone make the crime, nor does the death of the victim without a striking (or some other conduct or force) make the crime; it is a combination of the two." *People v. Rehman*, 62 Cal.2d 135, 139 (1964).

[12] There exists, as Justice Chase explained in *Calder*:

> a manifest distinction between the case where one fact relates to, and affects, another fact, as where an after fact, by operation of law, makes a former fact, either lawful or unlawful; and the case where a law made after a fact done, is to operate on, and to affect, such fact. In the first case both the acts are done by private persons. In the second case the first act is done by a private person, and the second act is done by the legislature to affect the first act.

Calder v. Bull, 3 U.S. 386, 390, 393 (1798).

discharged the legal and criminal significance of his actions that predated September 1973.[13] An *ex post facto* analysis under *Calder* category one then cannot occur without also understanding the legal significance of the passage of the date September 1976. As this Court explained, the critical inquiry is "whether the law changes the legal consequences of acts completed before its effective date."[14] *Weaver v. Graham*, 450 U.S. 24, 31 (1981) (finding that even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates *ex post facto* if, as here, it retroactively reduces the amount of good time which could be earned by prisoners) (cited with approval in *Miller v. Florida*, 482 U.S. 423, 430 (1987).)

Thus in *Lynce v. Mathis*, 519 U.S. 433, 435 (1997), a prisoner, convicted in 1986, received good time credits awarded solely to relieve overcrowding under a 1983 statute and was released in 1992. A new statute, given effect retroactively, reduced said credits and resulted in the prisoner's reincarceration. *Id.* at 436. Arguing against the *ex post facto* claim, the State asserted it could have relieved overcrowding by other means and thus at most had created only a speculation or hope that the prisoner would receive such credits. *Lynce*, 519 U.S. at 437. This Court found the argument unpersuasive noting that the prisoner was actually awarded the credits before they were retroactively canceled. It held that "[t]he 1992 statute has unquestionably disadvantaged petitioner because it

[13] The September 1976 date reflects the date of expiration of the last applicable limitations period in this case.

[14] There is a distinct difference between an act which, by operation of law may vest an accused with a right, and a law which seeks to undo what has already been accomplished by operation of law. *See Weaver*, 430 U.S. at 30-1. It is not necessary under *ex post facto* analysis for any right to be vested for a violation to occur. *Id.* Petitioner's argument is strengthened, however because a right has also vested.

resulted in his rearrest and prolonged imprisonment." *Id.* at 446-47. It was the fulfilling of the conditional secondary act, the actual granting of the credits, which had ameliorated the punishment under the primary act that, when taken by State action, violated *ex post facto*.

In *State v. Keith*, 63 N.C. 140 (1869), 1869 W.L. 1378 (N.C.), the Supreme Court of North Carolina was confronted with this issue in the context of a legislative grant of "unequivocal pardon" to Civil War soldiers for all homicides and felonies done in discharge of their duties. *Id.* at *2. This Act was subsequently repealed and a former soldier prosecuted. *Id.* Finding the effect of the pardon under state law to entirely destroy the offense, as if never committed, the court held the repeal *ex post facto* as making criminal what before the repeal was not. *Id.* at *3-4. While never squarely addressing this issue, this Court has agreed in dictum in *Cummings v. Missouri*, 71 U.S. 277, 329 (1869).[15]

A Statute of Limitations, particularly in California functions in the exact same way. In this regard it legally divests the State of a cause of action in its entirety, removes the punishment that might have been annexed, and bars a legal conviction. In Petitioner's case, the two relevant acts had already occurred, the alleged primary act has passed, but so too has the secondary act which has altered any legal significance the primary act may have had as a criminal or criminally punishable matter.

[15] Nor was the Court's discussion purely theoretical. In *Ex Parte Garland*, 1 U.S. 333 (1866), the companion case to *Cummings*, the Court was again faced with loyalty oaths in the context of a former Confederate and lawyer, who had received an executive pardon, and wished to return to practice before the Supreme Court, but for such "loyalty oaths." The *ex post facto* issue was raised in this context but was not reached since the Court granted Garland relief on the basis of separation of powers in light of executive clemency.

In this regard it is important to recall that any allegations of wrongfulness are not evaluated as torts or moral wrongs, but whether or not a crime has been committed. A crime is solely an offense against a sovereign. *See Means v. Cheyenne Tribal Court*, 154 F.3d 941, 948 (1998). It is by definition sanctioned and enforced by the particular sovereign offended, which seeks retribution and promotes deterrence through its criminal laws. The particular sovereign in question then solely defines the crime.

In California, the Statute of Limitations has consistently been ruled a material ingredient of an offense. *See People v. Crosby*, 58 Cal.2d 713 (1962). The California Supreme Court has repeatedly recognized that prosecutions failing to establish this ingredient do not state a public offense[16] and are thus barred. In *People v. Chadd*, 28 Cal. 3d 739, 756 (1981), it was

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[16] Through Penal Code Section 15, California equates the terms crime and public offense and defines them as requiring both commission of the prescribed acts and punishment upon legal conviction. Both are necessary prongs to make a public offense. "The section is in the conjunctive; both of the conditions must be satisfied before the act will constitute a crime." *McComb v. Superior Court*, 68 Cal.App.3d 89, 96-7 (1977) citing *People v. Crutcher*, 262 Cal.App.2d 750, 754 (1968). *See also People v. McNulty*, 93 Cal. 427 (1892).

Penal Code section 15 provides:

> A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and by which, is annexed upon conviction, either of the following punishments:
> 1. Death;
> 2. Imprisonment;
> 3. Fine;
> 4. Removal from office; or
> 5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State.

(CAL. PEN. CODE §15 (West 1999)).

recognized that "the courts have described as 'failing to state a public offense' an accusatory pleading that shows on its face a violation of section 800." *People v. McGee*, 1 Cal.2d 611, 613 (1934) similarly held that an action barred by limitation fails to state a public offense. *See also People v. Rehman*, 62 Cal.2d 135, 139 (1964). In *Miller v. Florida*, 482 U.S. 423, 433 (1987), the Court noted that the proscribed violation occurs if the law "changes the ingredients of the offense or the ultimate facts" needed to establish guilt.

Thus in California a crime does not occur within the legal definition if barred by the Statute of Limitations. Whether this result is because the criminality of the act is removed, the punishment abolished, or because a legal conviction is barred, makes little difference since all are required to state a public offense against California.

Examining these terms of art within the *Calder* definitions, category one is violated by a law which seeks to create a public offense through 803(g) retroactively, when Petitioner has not committed a public offense. To then incorporate a new ingredient through 803(g) in order to criminalize his past behavior and punish him for it renders his lawfully acquired innocence into a crime.

Expressed another way, the destruction of the cause of action, by way of the Statute of Limitations results from the passage of the statutorily enacted period. The absence of a cause of action means not only that the state is barred from prosecution but that the court lacks fundamental subject matter jurisdiction as well. Because Petitioner's Statute of Limitations bar is complete he cannot be prosecuted.[17]

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[17] In California, a Statute of Limitations in a criminal case creates a substantive right, which renders a court wholly without

The Court's overruling of *Kring v. Missouri*, 107 U.S. 221 (1883) supports this analysis. *See Collins v. Youngblood*, 497 U.S. 37, 51 (1990).[18] *Collins* explained that *Kring* rested on expansive dicta, which was broader than the scope intended by the four categories in question. [19] This Court stated: "The references in

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jurisdiction once that right has ripened. The result of such ripening is that it destroys not only the remedy that might have been available if timely presented, but the underlying right or cause of action as well. *See People v. McGee*, 1 Cal.2d 611, 613 (1934) ("In criminal cases, the state, through its legislature, has declared that it will not prosecute crimes after the period has run, and hence has limited the power of the courts to proceed in the matter (citation omitted)); *see also Chambers v. Gallagher*, 177 Cal. 704, 708 (1918). "[W]hen the statute of limitation has run, the power to proceed in the case is gone." *McGee*, 1 Cal.2d at 614. The state has been divested of the right of action. *See also People v. Chadd*, 28 Cal.3d 739, 756 (1981) (a violation of the statute of limitations described as "failing to state a public offense." Thus the underlying cause of action was destroyed with the running of the statute. Section 803(g) therefore creates a new cause of action in violation of *Calder* category one.

[18] The *Collins* Court noted that the *Kring* decision was supported by only five members of the court, with four members voicing a strong dissent. *See Collins*, 497 U.S. at 48-50.

[19] This was essentially the same position taken by the *Kring* dissenters. *Kring* did not rest so much on whether or not his claimed defense was merely procedural or substantive, a line that has continually caused much consternation (*See Collins*, 497 U.S. 37, 44-5), but whether certain contingencies were required before their significance could be set up as a defense. In *Kring*, the primary act, the killing, had occurred before the change of law, but the significance of the secondary act—the resulting acquittal of first degree murder upon a plea to a second degree murder—had previously been altered by legislative act *before* Kring pled. At the time, the majority viewed the matter in a broad way as "alter[ing] the situation of a party to his disadvantage," a phrase often repeated but which *Collins* noted did not fully comport with the original *Calder* understanding. *Id.* at 235; *Collins*, 497 U.S. at 49.

On the other hand, the strong *Kring* dissent, joined in by the Chief Justice, and perhaps forecasting the views of the *Collins* majority, would have instead held that because the contingencies

Duncan and Malloy to "substantial protections" and personal rights" should not be read to adopt without explanation an undefined enlargement of the *Ex Post Facto* Clause." *Collins*, 497 U.S. at 46. As such, a contingent possibility, such as relied upon by *Kring*, which is dependant not just on the future acts of the accused, but of the prosecution as well, *and to which nothing* had yet attached, was an over inclusive definition of a defense based solely (at that point) on the law regulating the effect of guilty pleas which had already changed. *Id.* at 50.[20]

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themselves had not been fulfilled by the defendant prior to their change, the defendant had no basis upon which he could now claim to rely upon them. *Kring*, 107 U.S. at 240. As future contingencies, they were seen as no more than mere modes of procedure, which until acted upon, could be altered by the legislature. *Id.* at 241. As an unfulfilled secondary act, its repealed contingencies were of no legal effect or significance for Kring. The dissent would have found an *ex post facto* violation *only* if the contingencies had been fulfilled prior to the change in law. *Id* at 239-40.

[20] "It is the essential characteristic of an *ex post facto* law that it should operate retrospectively, so as to change the law in respect to an actor or *transaction* already complete and past. Such is not the effect of the rule of the constitution of Missouri now in question." *Kring v. Missouri*, 107 U.S. 221, 240 (1883) (Matthews J., dissenting; emphasis added). As the dissent in *Kring* pointed out, at best such a claim might fit within *Calder* category four but even then, it did not meet its requirements: while that rule (that a second degree murder plea obviated any charge of first degree murder) was in force the prisoner had no such evidence of which he could avail himself. How then, has he been deprived of any benefit from it? The evidence, of which it is said the prisoner has been deprived, came into being after the law had been changed. It was evidence created by the law itself, for it consists simply in a technical inference; and the law in force when it was created necessarily determines its quality and effect. It operated upon a transaction between the prisoner and the prosecution, which might or might not have taken place; and when it did take place that consent must be supposed to have been given by both with reference to the law as it then existed, and not with reference to a law which had then been repealed. *Id.* at 239-40.

Indeed in *Collins*, the defendant was convicted under a Texas law that allowed the State to sentence him to life imprisonment, but to which was added an unlawful $10,000 fine. *Collins*, 497 U.S. at 39. The new law, passed at a time when Youngblood's writ was pending, *but which had not yet been decided by the appellate court*, in fact acted to ameliorate the punishments in Youngblood's case by removing the fine altogether. *Id.* Youngblood's claim to be entitled to a new trial under the *Ex Post Facto* Clause while his appeal was pending had not yet attached, nor could he claim to have been harmed by a reduction in the punishment.[21] Youngblood conceded that his claim did not fall within the requisite *ex post facto* categories, but only within a broader view of the Clause, to wit that any alteration that deprived him of any potential benefit was taken *ex post facto*. *Id.* at 44. The *Collins* Court denied his request and in overruling *Kring*, limited the Clause to its proper foundation.[22]

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[21] It is a long held "controlling rule" that if "subsequent to judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed..." *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801). Of course the *Collins* concurrence recognized that if the reformatory law had acted to *impose* the improper fine, that would have violated the *Ex Post Facto* Clause because it would have increased punishment. *Collins*, 497 U.S. at 54 (Stevens, J. concurring.)

[22] Significantly, while the *Kring* court was divided 5-4, they were not so divided if both the primary and secondary acts had passed before any change in the law. Had such occurred all nine members of the court would have held for Kring. Even more significantly, both the majority and the minority expressed a similar view as held by Petitioner in regards to a Statute of Limitations where the time had actually passed. Both would have ruled it an *ex post facto* violation to allow 803(g) to act upon it. *See Kring*, 107 U.S. at 451 citing *State v. Sneed*, 25 Tex.Supp. 66 (1860) with approval and with the following language from the dissent:

Under *Calder* category one, the Statute of Limitations issue in the case before the Court must be viewed in light of these precedents. Here two acts are in question, the primary act being the alleged wrongdoing, and the secondary act by operation of existing law, divested the first act of certain legal significance. The secondary act was the passage of the three-year anniversary of the first act, occurring in Petitioner's case no later than September 1976. At that point, all criminality that might have attached in California was abolished.

Thus if the Statute of Limitations acts as a legal bar to prosecution, as it does in California, to allow either criminalization or punishment retroactively violates *Calder* category one.

Moreover, once the Statute of Limitations expired, the rebuttable presumption of innocence is transformed to a mandatory conclusive presumption of innocence. *See Carmell*, 529 U.S. at 532-33. The "presumption of innocence" is "bedrock, axiomatic and elementary – the foundation of our criminal law." *In re Winship*, 397 U.S. 358, 363 (1970). However, once the statute of limitations expires, the presumption of innocence becomes a mandatory conclusive presumption because the state can no longer meet the threshold requirement to rebutting the presumption of innocence, thereby rendering any conviction after the statutory period void. *See People v. Zamora*, 18 Cal.3d

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> it would be a violation of the constitutional maxim which forbids retrospective legislation inconsistent with vested rights, to deprive, by a repeal of statutes of limitation, a defendant of a defense which had become perfect while they were in force.

Kring, 107 U.S. at 231 (Matthewson, J., dissenting.)

538, 564-65 (1976); *People v. Le*, 82 Cal.App.4th 1352 (2000); *People v. Williams*, 21 Cal.4th 335 (1999); *Cf. United States v. Marion*, 404 U.S. 307, 322 (1971) ("These statutes [of limitation] provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.")

As A Defense

While the *Calder* categories do not explicitly mention the word "defense," they fall under the categories such that that they may not be removed retroactively. *See United States v. Hall*, 26 F.Cas. 84, (1809). The reason is clear: if the asserted defense defeats the prosecution, the person is acquitted.

The first time California's highest court considered the matter, they called the Statute of Limitations a good defense to defeat the prosecution. *See People v. Miller*, 12 Cal. 291 (1859). Since then no California Supreme Court has held otherwise. Rather than overrule this longheld fundamental defense, *People v. Frazer*, 21 Cal.4th 737 (1999) attempts to truncate the meaning of the relevant terms in order to hold it outside *Collins v. Youngblood*, 497 U.S. 37 (1990) and therefore not ex post facto. For each of the following reasons, they are wrong.

California Penal Code section 803(g) deprives petitioner of a complete defense that arose under the Statute of Limitations in existence at the time of his alleged offenses and which vested prior to any change in the law. By law then, Petitioner's defense would result in an acquittal. *See generally People v. Zamora*, 18 Cal.3d 538 (1976). The deprivation contravenes the prohibition against *ex post facto* legislation because it eliminates a defense that negates an ingredient the prosecution must prove to sustain a conviction. The defense also operates as a form of legislatively enacted

pardon, amnesty, or excuse.[23] The abolishment of the Statute of Limitations therefore violates the first *Calder* category.

Although *Collins v. Youngblood*, 497 U.S. 37 (1990) is cited by *Frazer* for the proposition that only certain defenses, those negating an element of the proscribed conduct or operating as an excuse or justification for the crime charged, are encompassed within the first and second *Calder* categories, in fact, the Court did not elaborate what defenses were included in those labels and which ones were excluded. *Frazer*, 21 Cal.4th at 757. It is important to note that *Collins* was not a case about defenses, pretrial, trial or otherwise. *Collins* ruled that a statute allowing appeals courts to reform and ameliorate improper sentences did not offend the *Ex Post Facto* Clause. *Collins*, 497 U.S. at 52.[24] Thus while the *Collins* Court was not specific, one can

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[23] Black's Law Dictionary defines excuse as follows:

> **excuse.** ... **2.** *Criminal Law.* A defense that arises because the defendant is not blameworthy for having acted in a way that would otherwise be criminal. • The following defenses are the traditional excuses: duress, entrapment, infancy, insanity and involuntary intoxication.

BLACK'S LAW DICTIONARY 430 (7th ed. 1999.) Although the statute of limitations is not listed as a "traditional" excuse, it falls within the definition since a defendant is no longer statutorily blameworthy, that is he can no longer be prosecuted or punished, even when his conduct would otherwise be "criminal."

[24] The *Collins* Court framed the result in the language of *Beazell v. Ohio*: "The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with a crime of any defense available according to law at the time when the act was committed." *Collins*, 497 U.S. at 169-70.

assume that a defense that negates a material ingredient of the crime charged or justifies or excuses conduct implicates the first *Calder* category. *See Collins*, 497 U.S. at 49-50. In the first instance, eliminating a material ingredient or ultimate fact that the prosecution must prove to sustain a conviction effectively makes evidence that would result in acquittal now supportive of a conviction.

The *Frazer* court waters down the *Collins* analysis such that the only defenses protected by the ban on *ex post facto* legislation are those that address the "'criminal quality of the act' as evidenced 'either by the legal definition of the offense or by the nature or amount of the punishment' at the time it occurs." 21 Cal.4th at 760. The court reasoned that its conclusion was warranted by reliance, which it viewed as the sole aim of the *Ex Post Facto* Clause.[25] *Frazer*, 21 Cal.4th at 757. It referred to *Collins* for reinforcement: "For this reason, *Collins* made clear that *ex post facto* protection extends only to 'defense[s]' bearing on the 'definition' and

[25] Justices Harlan warned against citing notice and reliance as the single goal of the *Ex Post Facto* Clause: "Aside from problems of warning and specific intent, the policy of the prohibition against *ex post facto* legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct, even though the conduct could properly have been made criminal and even though the defendant who engaged in that conduct in the past believed he was doing wrong (as for instance when the penalty is increased retroactively on an existing crime), may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons." *James v. United States*, 366 U.S. 213, 247 n.3 (1961). In declining to abandon the fourth *Calder* category, this Court echoed Justice Harlan: "... the absence of a reliance interest is not an argument in favor of abandoning the category itself. If it were, the same conclusion would follow for *Calder's* third category (increases in punishment), as there are few, if any, reliance interests in planning future criminal activities based on the expectation of less severe repercussions." *Carmell v. Texas*, 529 U.S. 513, 531 n.21 (2000).

'elements' of proscribed conduct, or involving 'excuse or justification' for its commission. *Id.* at 760 (emphasis omitted).

Although *Collins* made reference to defenses that are linked with the legal definition of the offense the decision in no way concludes that the government can abolish a defense that negates an element of the crime the prosecution must prove. *Collins*, 497 U.S. at 50. The *Frazer* definition of defenses truncates its proper examination by failing to account for the legislative and judicial definitions of a crime.[26] Rather, they limit their analysis solely to the elements of the proscribed conduct rather then the offense. Moreover, the *Frazer* definition of defense simply cannot apply with precision to all the defenses inherent in a defendant's absolute right to mount a defense. The court's decision also brings to light an interesting anomaly in the law. That is, the distinction between proscribed conduct and the elements of an offense the prosecution must prove at trial to sustain a conviction.

For instance, in California identity is not part of the definition of the proscribed conduct of a crime (CALJIC No. 2.72) (6th ed. 1996) and yet it is a required element that the prosecution must prove. (CALJIC No. 2.91) (6th ed. 1996.) Likewise, Statutes of Limitations in California are not part of the definition of proscribed

[26] Examining only the definition of penal code section 288 they do not find the limitations defense within its terms. The reason for this error is their failure to examine the ingredients that comprise this public offense in California. By statutory definition and judicial interpretation the scope of this defense is that it bars seizure of the person, conviction and punishment. A failure to prove this ingredient is fatal to a criminal cause of action maintained by the state. The state fails to comprehend that where no public offense lies, no crime has been committed.

conduct but are an element of a relevant offense[27] in which the prosecution bears the burden of proof. *See People v. Le*, 82 Cal.App.4th 1352, 1360 (2000).

It would be unthinkable for the legislation to retroactively abolish the defense of mistaken identification, and yet that is the necessary conclusion after applying the *Frazer* interpretation of *Collins*.

While California has made the molestation of children a crime, it has also made prosecution subject to limitations. When time runs, the accused holds a complete defense. This defense negates an element of the crimes charged, proof of which is borne by the prosecution. This defense also operates as an excuse.

Defenses of excuse do not operate in the same manner as defenses that negate an element. Consider the excuse of immunity. Asserting immunity from prosecution does not void an element of the "crime." Indeed the assertion is collateral to the proscribed conduct. The same could be said for such defenses as entrapment, necessity or the momentary handling of a controlled substance for the purpose of disposal. *See People v. Mower*, 28 Cal.4th 457, 480 (2002). These defenses essentially admit all of the elements of the relevant crimes as defined by *Frazer*. *Id.* at 480-81. To draw a distinction amongst defenses available to the defendant and provide lesser protection for certain substantive defenses is simply arbitrary. The same standards subsumed in the concept of fundamental fairness apply to all such defenses including excuse. Retroactive removal then is precisely the type of concern which the *Ex Post Facto* Clause was designed to prevent. There is no merit to an argument that purports to

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[27] The term relevant refers to those offenses where time is a material ingredient in the sense that they are accompanied by a Statute of Limitations. *See* CAL. PEN. CODE § 955 (West 1985).

remove an absolute defense from a distinct group of defendants because of the status of the crime with which they are charged. Although the State of California is entitled to abolish the statute of limitations prospectively, it cannot do so retroactively.

The State attempts to overcome the problem inherent herein by holding that all they need do is effectively remove this ingredient and a public offense is then stated. Even were that true it is qualitatively a different offense and by all accounts, a new offense. It also destroys this "good defense", turning what was a substantive right belonging to the people and redefining it as a remedial process belonging to the state. *See also People v. Doctor*, 257 Cal.App.2d 105, 110 (1967) ("We remind ourselves that the bar of the statute of limitations in a criminal matter is going to jurisdiction rather than merely a remedy.")

Calder Category Two

Under the *Ex Post Facto* Clause, the punishment aspect of retrospective legislation falls under both *Calder* one and three. The second category then refers to both the aggravation and enlargement of crime beyond the creation of new punishment or increases to existing punishment. It must therefore be viewed as a distinct category. While proscribed conduct can fall under more than one *Calder* category, *Calder* two certainly is not merely duplicative of the others. As Justice Paterson stated in *Calder*, "The enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty." *Calder*, 3 U.S. at 397. Similarly, while the State attempted to confine the *Calder* categories down to two, this Court has made clear that nothing in *Collins* or any other decision was meant in anyway to overrule *Calder's* original four categories which have been repeatedly endorsed by prior Supreme Court opinions. *See Carmell*, 529 U.S. at 525.

A law that aggravates or makes greater without simply falling into categories one or three encompasses a situation where the scope of the crime is made either larger or is now "more serious."[28] It is self-evident that a crime for which the state declares it is no longer seeking to try to convict or to incarcerate is less serious than one for which the state declares it will forever seek prosecution.[29] Secondly, the crime is enlarged because it now includes others within its grasp who previously were not, which is clearly the legislature's intent under 803(g). *See Stogner v. Superior Court*, 93 Cal.App.4th 1229 (2001); *People v. Frazer*, 21 Cal.4th 737 (1999). That such an enlargement is proscribed has been clear, see *Cummings v. Missouri* which found that a loyalty oath was exacted not to determine fitness for callings "but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen." *Cummings v. Missouri*, 71 U.S. 277, 320 (1866).

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[28] Justice Story, writing on the *Ex Post Facto* Clause noted that included "the act, if a crime, is aggravated in enormity, or punishment..." 3 Commentaries on the Constitution of the United States § 1339: 212.

Black's definition of "aggravate" as, "made worse or more serious," (Black's Law Dictionary 65 (7th ed. 1999)) is not unlike the concept understood in Webster's, "a: to make heavy: BURDEN b: INCREASE, 2: To make worse, more serious, more severe; intensify unpleasantly." WEBSTER'S NEW COLLEGIATE DICTIONARY 23 (7th 1974)."

[29] The Legislative purpose behind the Statute of Limitations supports the notion, recognizing the "fear that never-ending threat of prosecution will be more detrimental than beneficial to society." *Cowan v. Superior Court*, 14 Cal.4th 367, 375 (1996); *see also In re Medly*, 134 U.S. 160, 172 (1890) (recognizing that increases in mental anguish to prisoner which flowed from his inability to ascertain when the State might choose to execute its punishment enlarged punishment and was *ex post facto*.

The State further enlarges the crime by creating retroactive jurisdiction in the criminal courts of California. A proposition California courts had historically specifically held contrary to the meaning of their limitations period.[30] The Legislature, certainly in

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[30] The seminal case defining the statute of limitations as also jurisdictional in a criminal context is *People v. McGee*, 1 Cal.2d 611 (1934). In the first instance, they drew a distinction, "based on the different character in the proceedings" between criminal and civil statute of limitations. "In civil actions the statute is a privilege which may be waived by the party. In criminal cases, the state, through its legislature, has declared that it will not prosecute crimes after the period has run, and hence has limited the power of the courts to proceed in the matter. . .[W]hen the statute of limitation has run, the power to proceed in the case is gone." *Id.* at 613-14 (citation omitted.)

Thus, once the statute has ripened, a court is without subject matter jurisdiction to proceed regardless of whether the parties desire to waive or forfeit that right. *See also Chambers v. Gallagher*, 177 Cal. 704, 708 (1918) ("There can be no question that ...by passage of the statute of limitations [the legislature] intended a permanent divestment of a right of action in all matters to which the statute relates.") In California therefore, the courts have recognized not only the destruction of the remedy for a right, but that the right itself is destroyed. The State has been divested of the right of action. "In this connection, we remind ourselves that the bar of the statute of limitations in a criminal action is a matter going to jurisdiction rather than merely to remedy." *People v. Doctor*, 257 Cal.App.2d 105, 110 (1967) citing *People v. McGee*, 1 Cal.2d at 613; *see also People v. Chadd* 28 Cal.3d 739, 756 (a violation of the statute of limitations described as "failing to state a public offense.")

Thus in *Cowan v. Superior Court*, 14 Cal.4th 367, 371-72 (1996), the California Supreme Court grappled with this jurisdictional issue in a case where a defendant wanted to waive the right. If the statute was jurisdictional as *McGee* stated, then even the defendant lacked the ability to waive it. If it were "merely a substantive defense" he could waive it. *Id.* The issue in *Cowan* arose because the defendant, charged with murder, a cause of action for which no statute of limitations exists, wished to enter a plea to the lesser included offense of manslaughter, which was then viewed as potentially time barred. *Id.* at 370.

Rather than overrule well-established precedent, including

position to define it prospectively, instead made no such substantive change in their overhaul of the present statutory scheme effective since 1985. It is only now

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McGee, the *Cowan* court held that the lower court had retained jurisdiction over the murder charge actually before it, and, since no limitation applied to that cause of action, subject matter jurisdiction had not been lost. *Id.* at 374. The question became one of "excess of jurisdiction" as to the proposed plea bargain instead of a lack of subject matter jurisdiction. *Cowan*, 14 Cal.4th at 374. In that particular context, and not having lost the power to proceed, the defendant could choose, if he desired, to waive the statute as to the manslaughter charge. *Id.* In effect the *Cowan* court held that because the underlying right had not been destroyed, the question became solely one of approving an ameliorating remedy desired by the defendant who could therefore waive his substantive right to the lesser charge. "In this case, because the court had the power to proceed over the *murder* charge, it should also have the power to proceed over a lesser included ...offense." *Id.* at 373.

In *People v. Williams*, 21 Cal.4th 335 (1999), the court was again urged to reject the jurisdictional approach. The issue first having arisen on appeal, the State argued that *Cowan* had essentially done away with jurisdiction, such that if a defendant fails to timely raise the statute of limitations issue, then the defendant could unknowingly forfeit it. *People v. Williams*, 21 Cal.4th 335, 340 (1999). Rejecting this claim, the court upheld the *McGee* principle, stating "as has long been the rule of California, a person can raise the Statute of Limitations at any time in a time barred action." *Id.*, at 345.

Important in this analysis is an understanding that *Cowan's* did not overrule the jurisdictional approach per se, but only made a "slight adjustment" to its analysis to accommodate the desired plea to the lesser. *Id.* at 340. *Williams* makes clear that any broader interpretation of *Cowan* was not intended, nor necessary for its decision. *Id.* at 340-41. Rather, *Cowan*, held that to the extent *McGee* could be interpreted as barring pleas to "time barred lessers" it was overruled. *Cowan*, 14 Cal.4th at 372-374. This distinction is important in that it makes fundamental sense with the California view of Statute of Limitations. If the underlying cause of action is destroyed, then nothing can be done to resurrect it. However, where the underlying cause of action is not destroyed, then the court has power to provide a lesser "the remedy", and no sound policy reason exists for disallowing such a knowing waiver to a lesser if it is to the benefit of the accused.

that they attempt to create a different rule, only retroactively.

In *Means v. Cheyenne Tribal Court*, 154 F.3d 941, 942 (9th Cir. 1998) (overruled on other grounds in *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001), the Ninth Circuit was confronted with the question of whether a court, not having jurisdiction over a subject could nevertheless prosecute him for crimes committed within their jurisdiction. Lacking power over the subject, the sovereign lacked the ability to define his conduct as criminal. "Imposing jurisdiction retroactively therefore makes it a crime as to Means after the fact–exactly what is forbidden by the *Ex Post Facto* Clause." *Means*, 154 F.3d at 948.

Whether viewed as eliminating an element or defense, or creating jurisdiction retroactively, 803(g) essentially enlarges or aggravates the crime by encompassing others, like Petitioner, who, prior to 803(g) had not been within its reach.

Calder Category Three

California has long held that once the Statute of Limitations has run, the person cannot be punished. *See People v. Miller*, 12 Cal. 291, 294 (1859). In this way it is not unlike a limited pardon, which relieves the person of the punishment that may be imposed for a crime, but does not necessarily absolve him of the criminality itself. For even if the argument could be sustained that the term crime has a broader significance than given in California, or that punishment became fixed on the date of the primary act, nevertheless it is undisputed that on the second date the punishment for that "crime" was removed. *Id.*; *see also Lynce v. Mathis*, 519 U.S. 433, 449 (1997) (where the punishment once reduced could not be increased retroactively). The removal of punishment means that any new punishment for that same "crime" exceeds that which attached

previously, in violation of *Calder* Category three. But for Penal Code section 803(g), the state cannot inflict any manner or form of punishment upon defendants for whom the Statute of Limitations expired prior to enactment of the revival statute. Moreover, the State of California cannot do indirectly what it cannot do directly.

Calder Category Four

The new law that permits prosecution of Petitioner's time barred case effectively eliminates a material ingredient of the crime that the prosecution must prove in order to convict. Under Penal Code 803(g), the district attorney no longer needs to prove that the offenses occurred within the time period necessary to overcome the Statute of Limitations. Moreover the preexisting rules created an irrebuttable presumption that resulted in a dismissal. That same presumption is now withdrawn. However viewed, it is clear that this law "alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *See Calder v. Bull*, 3 U.S. 386, 390 (1798); *see also Carmell v. Texas*, 529 U.S. 513, 539 (2000). It violates *Calder's* fourth category.

The California Supreme Court's decision in *People v. Frazer*, 21 Cal.4th 737 (1999), decided before *Carmell*, misconstrued *Collins* to narrow the original four *Calder* categories to two: "Collins made clear that the two categories of impermissible retroactive legislation–redefining criminal conduct and increasing punishment –are exclusive." *Frazer*, 21 Cal.4th at 756.

The *Frazer* Court may not have anticipated this Court's reaffirmation of the fourth *Calder* category in

Carmell.[31] However, when Petitioner appealed a denial of his demurrer to the indictment and raised *Carmell* as an applicable authority, the appellate court once again indicated it was bound by *Frazer* and chose not to take up the issue. Likewise, the California Supreme Court declined to apply *Carmell*.

Penal Code section 803(g) retroactively eliminated an element the prosecution had to prove. Such a change is precisely the type deemed fundamentally unfair in *Carmell*: "A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof." *Carmell*, 529 U.S. at 532.

Carmell makes clear that the fourth *Calder* category remains an important restraint on the government's actions. Because an elimination of the statute of limitations through retroactive application of section 803(g) fundamentally alters the prosecution's burden necessary to convict, section 803(g) violates the *Ex Post Facto* Clause.

B. Due Process

The state cannot under the auspices of police power retroactively rescind a statute, which rendered the state powerless to prosecute, divested the court of jurisdiction and provided Petitioner with a complete

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[31] Since *Carmell* was decided, the Court of Appeals for the Second District has recognized that *Frazer* may have indeed misread the United States Supreme Court's intent, noting that many appellate courts, including in California, and citing *Frazer* specifically, mistakenly believed that *ex post facto* "did not prohibit the application of new evidentiary rules...." *In re Melvin J.*, 81 Cal.App.4th 742, 758 n. 7 (2000.)

defense in the event of trial. To do so violates Petitioner's fundamental right to liberty.

Among individual rights, liberty is ranked as fundamental. Liberty's meaning is expansive and encompasses issues such as the right to refuse medical treatment, contraception and family life. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). However, freedom from physical restraint is at the core of our understanding of liberty. No other right can be deemed more fundamental. *See e.g., Reno v. Flores*, 507 U.S. 292 (1993); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987); *Ingraham v. Wright*, 430 U.S. 651 (1977).

Nonetheless, as with all rights, liberty is not absolute. It must be harmonized with other rights and powers stemming from the United States Constitution or some other independent source. *See Texaco Inc., v. Short*, 454 U.S. 516, 525-26 (1982). The police power is one that finds its source independent of the United States Constitution. It is based in the state's sovereign nature and its duty to protect the health, safety and welfare of its citizens. However this power has never been viewed as omnipotent. As with individual liberty, the State's police power is also not absolute. *See Calder v. Bull*, 3 U.S. 386, 387-88 (1798); *Fletcher v. Peck*, 10 U.S. 87, 135 (1810).

Penal Code section 803(g) amplifies the conflict inherent in Petitioner's fundamental right to liberty and the state's sovereign police power. However the conflict created by the enactment of 803(g) violates due process where California legislatures, since the state's inception, have always utilized criminal Statutes of Limitation and California courts have always interpreted these statutes to confer a substantive and irrevocable right.

The passing of time, now complete under the terms set by the State itself, divests from the State the power to prosecute and restores Petitioner's liberty. It is no longer subject to state intrusion. This exhaustion of power and restoration of liberty is irrevocable; the presumption of innocence previously afforded to the Petitioner is now irrebuttable.

Fundamental Right of Liberty

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). The due process clause of the Fifth Amendment applicable to the states through the Fourteenth, was intended to secure for individuals, *inter alia*, the "right to be free from and to obtain judicial relief, for unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). The guarantees afforded "always have been thought to encompass freedom from bodily restraint and punishment." *Id.* at 673-74 (finding that freedom from corporal punishment implicates a liberty interest); *see also Reno v. Flores*, 507 U.S. 292 (1993); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (commitment to a mental health facility implicates a liberty interest); *United States v. Salerno*, 481 U.S. 739, 755 (1987) (right to liberty implicated by pretrial detention).

A liberty interest can also be created by state statute. Coupled with its creation is the expectation that it will not be taken arbitrarily. Due process is the stronghold for such vital interests and this Court has time and again affirmed that a State cannot statutorily confer a liberty interest and arbitrarily withhold or destroy it. *See e.g., Sandin v. Connor*, 515 U.S. 472, 483-84 (1995) (recognizing "that states may ... create liberty interest which are protected by the Due Process Clause"); *Board of Pardons v. Allen*, 482 U.S. 369, 377-78 (1987) (parole statute mandating release once

designated findings were made created liberty interest); *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980) (statute permitting transfer of prisoner to mental health facility upon finding of mental illness created a liberty interest); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (state created right to good time credits that could be taken only for serious misbehavior created a liberty interest); *Carlo v. City of Chino*, 105 F.3d 493, 497 (9th Cir. 1997) (statute requiring arrestees be given phone calls that could be denied only in event of physical impossibility conferred a liberty interest.)

Underscoring this point, the *Wolff* Court stated, "We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state. The touchstone of due process is protection of the individual against arbitrary action of the government." *Wolff*, 418 U.S. at 558.

Although these cases also refer to the process required as a preventative measure against arbitrary action, Petitioner maintains that no amount of process will suffice. Here the harm is ongoing, for the prosecution that California had no power to bring is occurring, the forum for which no jurisdiction existed has ruled against Petitioner and the absolute defense to this unlawful action has been destroyed. This situation was contemplated by Justice Harlan when he wrote, "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three." *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan J., dissenting).

State Power

It is unquestionable that the State possesses the power to define criminal conduct and prohibit said conduct through legislation; that it can prosecute where probable cause exists to believe a crime was committed; and that it can punish where it has proven to a jury or the court as fact finder that the crime was committed.

It is also a maxim that the State possesses the power to destroy such crimes, as well as their effects. It can repeal criminal statutes, thereby erasing the criminality attached to such conduct; it can decline to prosecute by granting immunity or by enacting legislation that provides for pretrial diversion[32]; and it can ultimately pardon conduct either prior to or after a guilty finding by jury or court; thereby erasing punishment or criminality or both.

However, the State can assert no basis for a claimed "retention" of an expired power to prosecute. Indeed, such a proposition is contrary to all accepted views of constitutional government. For if the inalienable rights of life and liberty are vested in the people, and if in limited circumstances the State is permitted to curtail that liberty, when that permission ends, even if by nothing more than an act of legislation, then the State is without the power to act.[33]

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[32] Thus under Penal Code Section 1000 et seq., even after a plea of guilty to certain possessory type drug charges, a person is absolved of all criminality for all respects, including permitting a successful divertee to state upon all job applications, save those related to law enforcement, that he/she has never been arrested, prosecuted, or convicted for said diverted crimes. (CAL. PEN. CODE § 1000 et. seq. (West 1985 & Supp. 2002.)

[33] "[The statute of limitation's] terms not only strike down the right of action which the state had acquired by the offence, but also remove the flaw which the crime had created in the offender's title to liberty. In this respect, its language goes deeper than statutes barring civil remedies usually do. They expressly take away the

Thus it cannot proceed to prosecute those who have successfully completed pretrial diversion. It cannot fail to follow through with its obligations pursuant to a plea negotiation. It cannot repeal a grant of immunity from prosecution. It cannot repeal a pardon. In short, the state cannot undo; so as to divest a substantive right accrued to the individual, that which was done through a lawful exercise of its police power.

State action that is tantamount to a wanton or arbitrary interference with private rights is not a permissible exercise of a state's police power. *See Atlantic Coast Line R.R. Co., v. City of Goldsboro*, 232 U.S. 548, 559 (1914). California claims the power to repeal a Statute of Limitations that has with due course of time, granted the Petitioner a substantive right to be free from prosecution, beyond the reach of jurisdiction and the ability to utilize this absolute defense to secure the right granted. This it cannot do.

This was the understanding of Chief Justice Marshall in *Fletcher v. Peck*, 10 U.S. 87, 135 (1810), when he stated, "But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by an absolute power."

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remedy only by suit, and that inferentially is held to abate the right which such remedy would enforce, and perfect the title which such remedy would invade; but this statute is aimed directly at the very right which the state has against the offender, the right to punish, at the only liability which the offender has incurred, and declares that this right and this liability are at an end." *Moore v. State*, 43 N.J.L. 203 (1881); *see also Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg J., concurring) (although "... a ... State may ... serve as a laboratory; and try novel social and economic experiments, I do not believe that this includes the power to experiment with the fundamental liberties of citizens ...") quoting *Pointer v. Texas*, 380 U.S. 400, 413 (1965).

California cannot do to Petitioner's vested liberty what Georgia could not do to Fletcher's vested title to property.

Historical Practice

In 1976, California exhausted its power to proceed against Petitioner. It terminated with the running of the Statute of Limitations duly enacted. The decisional law in place since this State's first inquiry into the meaning of the Statute of Limitations in the criminal system in 1859 permits no other alternative. Indeed, all of California jurisprudence mandates that the passing of time has irrevocable consequences. *But see People v. Frazer*, 21 Cal.4th 737 (1999).

California's Statute of Limitations was first enacted in 1850; the same year California became a state. It was later codified by the California legislature in 1872. *See People v. Frazer*, 21 Cal.4th 737, 743 (1999). Since its introduction, the availability of the statute as a complete defense has been made abundantly clear. *See People v. Miller*, 12 Cal. 291, 295 (1859) (finding that time was material to any offense subject to limitation, and thus, "*Prima facie*, the lapse of time is a good defense...").

Over the centuries, the California Supreme Court has repeatedly endorsed this view of the statute declaring it to be a substantive right. *See People v. Zamora*, 18 Cal. 3d 538, 547 (1976); *People v. Chadd* 28 Cal.3d 739, 757 (1981). Even *People v. Frazer*, 21 Cal.4th 737, (1999), agreed that Statutes of Limitation exist for the defendant's benefit, such statutes "seek to protect both the judicial system[34] *and the defendant*

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[34] Statutes of Limitations aid in reducing the costs inherent in investigation and prosecuting old claims and the inevitable congestion of the courts where the presentation of these claims

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run on the criminal offense. *See Blackburn v. Superior Court*, 21 Cal.App.4th 414, 428 (1993).

Thus the Statute of Limitations must be viewed in this context. It expresses a rule of such finality that we have been assured that when the bar is in place we may not only speak freely, but may even be compelled to speak. It is this understanding, so deeply rooted in our traditions and consciousness as to trigger the relinquishment of other rights routinely afforded to criminal defendants, that 803(g) seeks to wrench from its historical and constitutional context.

So clear has this rule been that throughout the country's history it has been disputed only rarely. Until *Frazer* each such attempt was rejected. *See People v. Frazer*, 21 Cal.4th 737 (1999). A challenge was proffered in 1860 in Texas, and rejected. *See State v. Sneed*, 25 Tex.Supp. 66 (1860) ("The state having neglected to prosecute within the time prescribed for its own action, lost the right to prosecute the suit.") There were similar challenges with similar results in New Jersey in 1881 and in Oregon in 1994. *See Hart Moore v. State*, 43 N.J.L. 203, 1881 WL 8329 at *6 (1881) ("Until the fixed period has arrived, the statute is a mere regulation of the remedy, and, like other such regulations, subject to legislative control; but afterwards, it is a defence, not of grace, but of right; not contingent, but absolute and vested; and, like other such defences, not to be taken away by legislative enactment.");[35] *State v. Cookman*,

[35] *See Hart Moore v. State*, 43 N.J.L. 203 (1881) ("[I]t would be a strained and unnatural interpretation of our act to say that it simply withholds jurisdiction from the court. Its language ... does not relate to the courts, but to the person accused. The answer which, under it, the defendant must make to an accusation before the tribunal which once had the right to punish him, is, not that the court has no jurisdiction to inquire into his guilt or innocence and pass judgment, but that, after inquiry, the court must pronounce judgment of acquittal. And probably no one would

127 Or.App. 283 (1994) ("In short, we cannot accept the proposition that the state has the supernatural power to exhume and revitalize a prosecution that is dead and buried.") [36]

The Substantive Nature of the Right

While *Frazer* denied a substantive due process claim, it failed to apply or explore the nature of this right.[37] A review of California case law shows the various stages at which this substantive right can be asserted. Its use as a multifaceted defense speaks to its inherent power.

In California, the Statute of Limitations defeats the power to prosecute in the first instance and serves as a defense to attack the charging document such as by way of demurrer. *See People v. Ayhens*, 85 Cal. 86 (1890) (approving such action under Penal Code Section

contend that after such judgment, any change in the law could legally subject the defendant to a second prosecution.") California courts are in accord, but of course also deny jurisdiction.

[36] The historical practice even at common law in England shows a general repugnance towards retrospective legislation in general. *See Dash v. Van Kleeck*, 7 Johns. 477 (1811) (Kent, Ch., J.) ("There has not been, perhaps a distinguished jurist or elementary writer, within the last two centuries, who has had occasion to take notice of retrospective laws, either civil or criminal, but has mentioned them with caution, distrust or disapprobation.")

[37] *Frazer*, instead called Statutes of Limitation "acts of legislative grace," without further explanation and ignoring Supreme Court precedent that altering penal statutes, even those "accorded by the grace of the legislature" are not insulated from constitutional scrutiny. *Weaver v. Graham*, 450 U.S. 24, 30-1 (1981). Moreover while *Frazer* ruled on the meaning of section 803(g) in relationship to the new limitations period set up in the1985 legislation, it did not rule on claims based on the preexisting statutory rules upon which Petitioner also relies under Penal Code Section 805.5. While the lower court ruled the new statutes applicable, it relied solely on *Frazer* to deny the Constitutional rights even though *Frazer* never examined those rights in light of *Carmell v. Texas*, 529 U.S. 513 (2000).

1004 because it is a legal bar to prosecution). Thus a cause of action shown to be outside the statutory period fails to "state a public offense and the defendant could not be prosecuted thereunder and no judgment of conviction could be based upon it." *People v. Hoffman*, 132 Cal.App. 60, 62 (1933) (noting that this was the state of the law since *People v. Miller* 12 Cal. 291 (1859)); *People v. McGee*, 1 Cal.2d 611 (1934). Even where no demurrer is lodged, the prosecution can be defeated by special pretrial motion. *People v. Zamora*, 18 Cal.3d 538 (1976). At trial the matter is put at issue by a plea of not guilty and the State must bear the burden of proving that the Statute has not run in its case in chief. *See People v. Cunningham*, 99 Cal.App.2d 296, 299 (1950).

This right then is more than "simply" jurisdictional and is greater than an affirmative defense. The failure by the State to prove this element can result in a directed verdict (*see People v. Zamora*, 18 Cal.3d 538 (1976), or if submitted to the jury, to an acquittal. *See People v. Doctor*, 257 Cal.App.2d 105 (1967). As the California Supreme Court recognized in *People v. Zamora*, 18 Cal.3d 538, 565 n. 25 (1985), its bar is also "aimed as much at the *prevention of untimely prosecutions* as it is at the prevention of untimely convictions." (emphasis added). Thus California has long recognized that the running of the Limitations period is a legal bar to prosecution. *See People v. Asavis*, 27 Cal.App.2d 685, 687 (1938).

Moreover it renders void a judgment, even based on a voluntary plea of guilty, if found in violation of its proscription. *See People v. Hoffman*, 132 Cal.App. 60, 62-3 (1933). It is a basic attack on the court's ability to proceed in the first instance. *See People v. McGee*, 1 Cal.2d 611, 613 (1934). No court has ever maintained that California can exercise original jurisdiction in violation of the *McGee* rule. *See People v. Williams*, 21

Cal.4th 335 (1999); *cf. People v. Frazer*, 21 Cal.4th 737 (1999).

The State of California can no longer control this powerful right, which it chose to grant. It may not divest Petitioner of his liberty in defiance of the law it created, interpreted, employed, and repeatedly endorsed. Petitioner Marion Stogner has the fundamental right to be free from prosecution, twenty-two years after the Statute of Limitations has run. *State v. Sneed*, 25 Tex.Supp. 66 (1860); *Hart Moore v. State*, 43 N.J.L. 203 (1881); *State v. Cookman*, 127 Or.App. 283 (1994); *State v. Martin*, 138 N.H. 508 (1994.)

Although none of the evidence has changed, 803(g) alters the applicable rules so that they no longer obligate the State to concede that Petitioner must prevail. These facts no longer require a court to dismiss the matter or prevent it from passing further judgment or sentence on him. *See People v. McGee*, 1 Cal.2d 611 (1934); *People v. Hoffman*, 132 Cal.App. 60 (1934). In the same way he can no longer resist the powers of the prosecution on these facts. Penal Code Section 803(g) therefore removes from the defendant's arsenal the most complete and effective defense he can assert here. *See Carmell v. Texas*, 529 U.S. 513 (2000); *see also Montana v. Egelhoff*, 518 U.S. 37 (1956). Instead he is forced to face trial conclusively considered by the State and federal courts to be unfair. *See United States v. Marion*, 404 U.S. 307 (1971); *People v. Zamora*, 18 Cal.3d 538 (1976).

803(g) subtly, but effectively renders Petitioner's ability to marshal these facts (even though not part of his burden), ineffective to gain an acquittal. It alters the rules after the fact for the sole purpose of improving the prosecution's chance of conviction. *Carmell v. Texas*,

529 U.S. 513 (2000).[38] 803(g) does not in any way afford greater protection to Petitioner, rather, it increases his burden. Prior to 803(g) the conclusive presumption could not be dispelled even by demonstrating a lack of prejudice to the defendant. *People v. Zamora*, 18 Cal.3d 538, 547 (1976). After section 803(g), Petitioner bears the burden of convincing the court that the passage of time has resulted in loss or impairment of evidence. While it has long been recognized that there is an increasing difficulty faced by a criminal defendant in obtaining reliable evidence, or any evidence at all, as time passes, *Zamora*, at 546, it bears noting that the passage of time also impairs his ability to show the significance and reliability of such destroyed evidence. Section 803(g) then represents the worst type of burden shifting.[39] By rendering proof that these facts exist insufficient to bar prosecution, 803(g) makes a mockery of the right to present evidence on an issue firmly rooted in American jurisprudence.[40]

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[38] In *Carmel v. Texas*, the High Court commented, "the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell* at 532. The notions of justice and fair play have long been associated with the due process clause. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316. (1945).

[39] "While due process does not 'ba[r] States from making changes ... that have the *effect* of making it easier for the prosecution to obtain convictions,' *McMillan v. Pennsylvania*, 477 U.S. 79, 89, n.5 (1986) (emphasis added), an evidentiary rule whose sole *purpose* is to boost the State's likelihood of conviction distorts the adversary process. *Cf. Washington v. Texas*, 388 U.S. 14, 25 (1967) (Harlan, J., concurring in result; emphasis added); *Montana v. Egelhoff*, 518 U.S. 37, 68 (1996); (O'Connor, J., dissenting.)

[40] The Clause does place limits upon restriction of the right to introduce evidence, but only where the restriction offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. "Our primary guide in determining whether the principle in questions is fundamental is, of course historical practice." *Montana v. Egelhoff*, 518 U.S. 37, 68 (1996); *see also Medina v. California*, 505 U.S. 437, 446 (1992).

803(g) has already and will continue to deprive Petitioner of Liberty and the substantive and procedural rights necessary to ensure that Liberty. It permits California to destroy a state-ensured binding guarantee[41] which has been in place since the State's foundation and which was well understood to have this meaning of finality under American criminal jurisprudence.

Despite these well-recognized principles, the courts of California ignore them and all concerns for finality and plain meaning. On the one hand stating the right cannot be forfeited, the courts permit the state to forfeit it for Petitioner. *See People v. Williams*, 21 Cal.4th 335 (1999); *People v. Le* 82 Cal.App.4th 1352, 1360 (2000); *People v. Frazer*, 21 Cal.4th 737 (1999). Calling it a substantive right, they refuse to give it substance. *See. People v. Zamora*, 18 Cal.3d 538 (1976); *People v. Frazer*, 21 Cal.4th 737 (1999). They insist on a lack of jurisdiction yet claim 803(g) creates jurisdiction retroactively. *Accord People v. McGee*, 1 Cal.2d 611 (1934); *Cowan v. Superior Court*, 14 Cal.4th 227 (1996); *People v. Williams*, 21 Cal.4th 335 (1999); *People v. Frazer*, 21 Cal.4th 737 (1999).

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[41] In California cases, the passage of the statutory time has also been deemed akin to an immunity, (*see People v. Snipe*, 25 Cal.App.3d 742, 747 (1972); *see also People v. Hoffman*, 132 Cal.App. 60, 63 (1933)), or an "amnesty." *See In re Gustavo M.* 214 Cal.App.3d 1485, 1494 (1989). *See also In Re Bray*, 97 Cal.App.3d 506, 513 (1979) citing *State v. Keith* (1869) 63 N.C. 140 ("the ordinance was declared invalid because it deprived the prisoner of an immunity to which he had become entitled by statute. The amnesty act placed Civil War soldiers in the position as if the acts they committed were not criminal. The soldiers could not constitutionally be deprived of that benefit.")

Although the legislature had enacted special legislation through Penal Code section 805.5 preserving Petitioner's rights under prior law, the courts have ignored principles of finality expressed in doctrines such as stare decisis[42] and statutory interpretation. "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1974); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974) ("[A] court is to apply the law in effect at the time it renders its decision"). *People v. Haskins* 177 Cal.App.2d 84, 87-8 (1960) (Amendments may be construed as legislative reaffirmances of existing law).[43]

The legislature and the courts have ignored well established precedent that has expressed concern,

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[42] "[L]aw, to be obeyed, must be known; to be known, it must be fixed; to be fixed, what is decided to-day must be followed to-morrow; and *stare decisis et non quieta movere* is simply a sententious expression of these truths." 26 CHAMBERLAIN, THE DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT (1885).

[43] Prior to *Stogner*, a long line of legal tradition had analyzed the old Statute of Limitations upon which Petitioner relies, finding that the *ex post facto* clauses barred the statutory extension of a Statute of Limitations once the original term had expired. *See Lynch v. Superior Court*, 33 Cal.App.4th 1223, 1227-28 (1995); *People v. Eitzen*, 43 Cal.App.3d 253, 265-67(1974); *Sobiek v. Superior Court*, 28 Cal.App.3d 846, 849-50 (1972). *Stogner* has interpreted this Statute contrary to its long history and Petitioner's position that prior judicial determination should prevail is but a reflection of the type of finality expressed in the *Teague v. Lane* 489 U.S. 288(1989) rule. The point being that whether or not it violates the *Ex Post Facto* Clause as it is understood today, the meaning of that Clause as it was understood in 1985 has been incorporated into the Statute of Limitations by the Legislature's passage of 805.5. Even if not violative of *ex post facto*, taking this substantial right as it was defined in 1985 violates due process.

dismay and even shock at prosecutions after prolonged delay.[44]

Thus by allowing 803(g) to operate retroactively, the Legislature and the courts break the solemn compact between government and citizen and destroy the dignity inherent therein.[45] By enacting 803(g) the State has reneged on its agreement to its citizens and deprived Petitioner of a substantive right he has held for over twenty years. *Cf. People v. Quartermain*, 16 Cal.4th 600, 618-620 (1997) (breach of a promise not to use defendant's statement to impeach was fundamentally unfair and denied him due process of law). Instead, 803(g) allows the State to actively mislead with notice that is unfair.[46] California has advised all citizens that

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[44] *United States v. Irvine*, 98 U.S. 450 (1878) stated "It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the pension office." *Barker v. Municipal Court*, 64 Cal.2d 806 (1966)."The thought of ordering [defendant] to trial on this charge after a lapse of twenty years shocks the imagination and conscience." *Id.* In *Adams v. Wood*, 6 U.S. 336, 342 (1805), Chief Justice Marshall expressed the same concerns, stating it would be "utterly repugnant to the genius of our laws to allow such an action to lie at any distance of time." (internal quotations omitted.)

[45] In the context of unlawful searches this Court has acknowledged: "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence...." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

[46] The Due Process Clause also protects the interest in fair notice and repose that may be compromised by retroactive legislation; "a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application" (*Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)), "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *See Marks v. United States*, 430 U.S. 188, 191-192 (1997); *Rabe v. Washington*, 405 U.S. 313 (1972) (*per curiam*); *Bouie v. City of*

they need not keep up their guard, nor need prepare or preserve defenses. The citizenry has been informed that finally, there is no need to fear an attack on our fundamental rights from our government, righteous or not.

"Our Government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 455 (1928) (Brandeis, J., dissenting) (overruled on other grounds). "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. Having surrendered its right to prosecute by way of a statute of limitation, (*State v. Cookman*, 127 Or.App. 283 (1994) ; 873 P.2d 335; *State v. Dufort* (1992) 111 Or.App. 515, 519; 827 P.2d 192; *State v. Hodgson*, 108 Wash.2d 662, 667 (1987); 740 P.2d 848), the state may not renege on that promise years afterwards, when memories may have faded and evidence may have been destroyed." *Frazer, supra*, 21 Cal.4th at 780 (Kennard J., dissenting).

There are due process limits on arbitrary governmental behavior in revoking its promises of protection such as when the government confers a substantive right and then arbitrarily revokes it. *See Raley v. Ohio*, 360 U.S. 423, 425-26 (1959) (when defendants were assured of the right to remain silent by a legislative committee and then held in contempt for asserting it, this was "an indefensible sort of entrapment by the State.") While the Constitution does not guarantee defendants that they will be free from the prosecution after a fixed period of time, California, has conferred this very right via statute. *See Hicks v.*

Columbia, 378 U.S. 347, 353-54 (1964); *United States v. Lanier*, 520 U.S. 259 (1997).

Oklahoma, 447 U.S. 343, 346 (1980). "[T]he failure of the state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment preserves against arbitrary deprivation by a state." *Id.*

If 803(g) is allowed to stand it will eliminate an important substantive right that destroys the cause of action according to both California and United States Supreme Court precedents. [47] It has destroyed a matter of substance rather than of form. *See Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945). Therefore, forcing Petitioner to forfeit the substantive right to raise this bar is in and of itself a violation of due process.

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[47] *Chase Secs. Corp v. Donaldson*, 325 U.S. 304 (1945), construed the critical inquiry for due process analysis to be to determine how "the state court...construed the relationship between its limitation acts and the state law creating the asserted liability." *Chase*, 325 U.S. at 312, n 8. Indeed in only a limited line of civil cases has the statute of limitations been deemed subject to retroactivity, and only where the underlying right was conclusively shown not to have been destroyed. *See Campbell v. Holt*, 115 U.S. 620 (1885).

But where the right is statutorily created and is given a fixed period of time in which the remedy must be pursued, the United States Supreme Court has agreed the right itself is destroyed when the limitations period expires, and depriving an accused of this limitations defense by way of retroactive legislation does violate the due process clause. *See William Danzer & Co. v. Gulf & S.I.R., Co.*, 268 U.S. 633 (1925). *Chase* itself recognized this important distinction, noting *Danzer* and *Davis* stand for the proposition that retroactive legislation will result in a due process violation "where a statute in creating a liability also puts a period after its expiration...." *Chase*, 325 U.S.at 312 n. 8.

There are no common law crimes in California; all crimes are created by way of statute. Cal. Pen. Code, § 6; *see also In re Brown*, 9 Cal.3d 612, 624 (1973). California has similarly created a limitations period on certain classes of crimes, including Penal Code § 288. Thus depriving Petitioner of his limitations defense violates due process.

At no point in our history has the opposite rule been shown to exist. *See People v. Frazer*, 21 Cal.4th 737, 777 (1999) (Kennard, J., dissenting).[48] The societal benefits of the Statute of Limitations also underscore a more basic societal sense of fair play and decency (*Rochin v. California*, 342 U.S. 165, 172 (1952)) in not making promises only to break them retroactively years later.

California has stated in no uncertain terms that their power to prosecute has ended. Simultaneously, they have decided that Petitioner has been conferred thereby a substantial right. His liberty interest is then inviolate.[49] The State has retained no power upon which

[48] "Today, California becomes the only jurisdiction, state or federal, to permit 'revival' prosecutions under an extended statute of limitations enacted after the expiration of the original statute of limitations. All other jurisdictions that have addressed the issue have concluded or assumed that these prosecutions violate article I, section 10, clause 1 of the federal Constitution, which provides that '[n]o state shall pass any ... ex post facto law ...'." *Frazer*, 21 Cal.4th at 777 (Kennard J., dissenting) (citations omitted).

[49] The State would have this Court ignore the history of both California and the United States in this regard. Rather they would equate the Petitioner's clearly defined substantive rights and liberty interest with nothing more than vague economic interest type cases.

However, even if the court were to engage in a balancing test, the result should still favor Petitioner. *Frazer* proffered the following justification for the legislation: the difficulty by alleged victims in remembering the wrongs themselves, and/or the "emotional vulnerability at the hands of the perpetrators." *People v. Frazer*, 21 Cal.4th 737, 773 (1999). Such justifications may well sustain an increase in the limitations period in prospective cases, however this justification ignores that society by its use of Statutes of Limitations has *already* taken into account that the passage of time will naturally void even sympathetic claims. Indeed, to the extent that some perpetrators of crimes will escape punishment holds true for all crimes subject to a Statute of Limitations and has *always* been a cost society has been willing to incur in exchange for the benefits of repose. Moreover, because Penal Code section 803(g) is not limited in any fashion to victims who have repressed the wrongs done them, and might therefore claim recent discovery of the harm, or who might

it can infringe Petitioner's liberty interest. "In our society liberty is the norm." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

"The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986). This Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); quoting *U.S. v. Salerno*, 481 U.S. 739, 750 (1987).

CONCLUSION

For all the foregoing reasons, relief should be granted and the prosecution dismissed.

Dated this 16th day of January, 2003

Respectfully submitted,

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otherwise be prevented from pressing the claim by the alleged perpetrator, any person can trigger the provisions of Penal Code section 803(g) at *any* time *they* choose, regardless of their own knowledge or ability to press the claim or length of delay.

Supreme Court
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No. 01-1757

In The

Supreme Court of the United States

MARION REYNOLDS STOGNER,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of California, First Appellate District

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QUESTIONS PRESENTED

1. Does a California statute that retroactively changes the statute of limitations, so as to revive a previously-expired cause of action in a criminal case, on its face, violate the *Ex Post Facto* Clause?

2. Does a California statute that retroactively changes the statute of limitations, so as to revive a previously-expired cause of action in a criminal case, on its face, violate the Due Process Clause?

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STATEMENT OF THE CASE

A. Statutory Background

The California Penal Code generally provides that the prosecution of an alleged child molester must be commenced within a fixed number of years after the crime was committed. Cal. Pen. Code §§ 800, 801. In 1994, the California Legislature enacted California Penal Code section 803(g), thereby adding an exception to the statutory scheme.

Section 803(g) provides that, notwithstanding the normally-applicable statute of limitations, a complaint alleging the commission of a specified sex offense against a child may be filed within one year of the date the victim reports the crime to a California law enforcement agency if certain conditions are met. First, the crime must have involved substantial sexual conduct, which is defined to mean vaginal penetration or rectal penetration by a penis or a foreign object, oral copulation, or mutual masturbation. Cal. Pen. Code §§ 803(g)(2)(B), 1203.066(b). Second, charges may be filed only if there is "independent evidence that clearly and convincingly corroborates the victim's allegation." Cal. Pen. Code § 803(g)(2)(B). "No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial," and "[i]ndependent evidence does not include the opinions of mental health professionals." *Id.*

Following the enactment of section 803(g), several state court of appeal decisions held that it could not be applied to cases in which the normally-applicable statute of limitations had expired prior to January 1, 1994, the effective date of the provision. Some of these courts held the Legislature had not intended section 803(g) to be

applied retroactively; others opined it would violate *ex post facto* principles. Still other courts found no statutory or constitutional bar to applying the statute retroactively. *See People v. Frazer*, 21 Cal. 4th 737, 745-46 & nn.5-8, 982 P.2d 180 (1999) (discussing history of the provision), *cert. denied*, 529 U.S. 1108 (2000).

In 1996, the California Legislature responded to those courts that were reluctant to apply the statute retroactively. By nearly unanimous vote, the Legislature amended section 803(g) to expressly state its intention that the law be applied retroactively. The amendment also made explicit the Legislature's intent to revive previously-expired causes of action if the requirements of section 803(g) were met. *See People v. Frazer*, 21 Cal. 4th at 746-47; *see also infra* notes 6 and 7 and accompanying text.

Three years later, in *People v. Frazer*, 21 Cal. 4th 737, the California Supreme Court addressed the questions of whether retroactive application of section 803(g), on its face, violated the *Ex Post Facto* Clause or the Due Process Clause of the United States Constitution or the California Constitution. That Court held that retroactive application of the statute was not barred as a matter of either federal or state constitutional law. A retroactive change in the statute of limitations, the court found, does not fall within one of the four proscribed categories of laws that violates *ex post facto* principles. The expiration of a statute of limitations also confers no fundamental right, and, because California Penal Code section 803(g) is well-suited to addressing the serious concerns that prompted the statute, it does not violate substantive due process. The defendant's protection from the prejudicial loss of evidence, if any, the court held, would come from procedural due

process guarantees.[1] This Court declined to review that decision. 529 U.S. 1108.

B. Factual and Procedural Background

In 1998, during the course of an investigation of petitioner's son, who was suspected of sexually abusing his stepdaughter, the police interviewed petitioner's daughter. She said she was not surprised by the allegation, because that brother had molested her as a child. She also reported, for the first time, that her father, the petitioner, had molested her as a child. The investigation led the police to petitioner's other daughter, who also reported, for the first time, that petitioner had molested her as a child. The victims reported that petitioner had subjected them to acts of oral copulation, sodomy, intercourse, and digital penetration. (Contra Costa County Indictment No. 010398-6, Reporter's Transcript (hereafter RT) 36-116.)

Within three months of the victims' reports, the State of California charged petitioner with two counts of lewd or lascivious conduct with a child under the age of 14 years, in violation of California Penal Code section 288(a). (RT 37.) The first count alleged petitioner molested his older daughter between January 1, 1955 and September 30, 1964; the second count alleged he molested his younger

---

[1] Subsequently, the California Supreme Court held that a second amendment to the statute, enacted in 1997, to permit the refiling of previously-dismissed cases under narrowly-defined circumstances, Cal. Pen. Code, § 803(g)(3)(B), in some instances violates the separation of powers clause of the California Constitution. *People v. Bunn*, 27 Cal. 4th 1, 37 P.3d 380 (2002); *People v. King*, 27 Cal. 4th 29, 37 P.3d 398 (2002). That provision is not in issue in this case.

daughter between January 1, 1967 and September 27, 1973. Because the normally-applicable statute of limitations had expired, the prosecution was commenced pursuant to California Penal Code section 803(g). (J.App. A at 1-4.)

Petitioner demurred, arguing that retroactive application of section 803(g) violates the *ex post facto* provisions of the state and federal constitutions. The trial court sustained the demurrer, and the People appealed. (J.App. B at 5-6.) The California Court of Appeal reversed, holding it was bound by the California Supreme Court's decision in *People v. Frazer*, 21 Cal. 4th 737. (J.App. B. at 6-8.) After the California Supreme Court denied discretionary review, petitioner filed a petition for writ of certiorari in this Court, alleging that *Frazer* was wrongly decided. This Court denied the petition. *Stogner v. California*, 99-8895.

The complaint was reinstated, but it subsequently was dismissed on the People's motion because the prosecutor had obtained a grand jury indictment. (J.App. G at 21.) The indictment, filed in March 2001, charged petitioner with the same crimes as charged in the complaint, and it alleged the prosecution was commenced pursuant to California Penal Code section 803(g). (J.App. D.)

Petitioner demurred to the indictment. The trial court overruled the demurrer (J.App. E), and petitioner sought review in the California Court of Appeal. In an unpublished portion of its opinion, that court, again, held that it was bound by *Frazer*, and it denied petitioner's claim. (J.App. F.) The court denied petitioner's motion for rehearing, and the California Supreme Court denied review. (J.App. H, I.)

SUMMARY OF THE ARGUMENT

California Penal Code section 803(g) retroactively changes – and effectively extends – the statute of limitations applicable to specified acts of child molestation. This sensible piece of legislation, designed to address a serious societal problem, violates neither the *Ex Post Facto* Clause nor the Fourteenth Amendment Due Process Clause of the United States Constitution.

1. The *Ex Post Facto* Clause was adopted in response to egregious acts of political retribution in common law England. As explained by Justice Chase in *Calder v. Bull*, 3 Dall. 386 (1798), its purpose was to protect against four specified categories of laws. Over the ensuing two centuries, this Court has repeatedly affirmed the four *Calder* categories as the exclusive definition of the *Ex Post Facto* Clause's protections. The retroactive extension of a statute of limitations does not fall within any of those categories.

A law comes under the first *Calder* category when it declares to be a crime conduct that was not prohibited at the time it was committed. Such a law, which can operate by changing the legal definition or elements of existing offenses, punishes a citizen for conduct he had no reason to believe was prohibited. A statute of limitations does not fit within this category because it has no bearing on the definition of the offense as established by the elements of the crime. By pleading the statute of limitations, a defendant simply asserts that, by virtue of an extrinsic condition unrelated to the commission of the offense, he cannot be prosecuted for the crime. It bears absolutely no relation to guilt or innocence, which is the concern of the first *Calder* category. Petitioner seeks to overcome this reasoning by arguing that, as a matter of California law, the

statute of limitations is an element of criminal offenses. To the contrary, the California Supreme Court recently and definitively held it is not.

Petitioner also relies on *Collins v. Youngblood*, 497 U.S. 27 (1990), where this Court explained that a law may violate the first *Calder* category if it deprives a person charged with a crime of a defense available at the time the act was committed. The Court made clear in *Collins*, however, that the *Ex Post Facto* Clause is not violated any time a State withdraws a defense or alters the situation of the defendant to his or her disadvantage. Rather, the Court reaffirmed that the types of defenses covered by the first *Calder* category are those that would change the definition or elements of the charged crime or involve an excuse or justification for the underlying conduct. A statute of limitations, though a defensive measure, is unrelated to the definition of a crime or its elements. It is unlike true defenses, such as self-defense or heat of passion, which transform what would have been a criminal act into something that is not criminal or is of a lesser criminal nature.

Nor does section 803(g) fall within the remaining *Calder* categories. The second and third categories prohibit laws that affect punishment, either by creating a punishment or by making an existing punishment more severe. A change in the statute of limitations, standing alone, simply has no bearing on how a crime will be punished.

The fourth *Calder* category prohibits laws that alter the legal rules of evidence and receive less, or different, testimony than the law required at the time the crime was committed, in order to convict the offender. A change in the statute of limitations does none of those things. It merely

regulates the time at which a crime, defined and punished elsewhere, may be charged. Even if applied retroactively, such a change does nothing to alter the State's evidentiary burden to prove the defendant's guilt by establishing beyond a reasonable doubt all the elements of the charged crimes as they existed when the crime was committed. The quantum and kind of proof required to establish the defendant's guilt, and all questions that may be considered by the trier of fact in determining guilt or innocence remain the same. In *Carmell v. Texas*, 529 U.S. 513 (2000), this Court explained that the fourth category is a mirror image of the first category. And just as section 803(g) does not fall within the first category, it also does not fall within the fourth category.

A holding that section 803(g) violates the *Ex Post Facto* Clause would not serve any of the clause's purposes. First, individuals quite obviously do not rely on statutes of limitations when they commit crimes. Second, no showing has been made that the California Legislature vindictively targeted petitioner or a class of defendants when it enacted section 803(g). Third, and finally, the provision does not implicate constitutional fairness concerns. Statutes of limitations are a form of legislative grace based on "necessity and convenience," whose "operation does not discriminate between the just and the unjust claim." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). By retroactively extending the limitations period, California has provided a heightened degree of justice to both the accused and accuser.

2. A retroactive change in the statute of limitations, then, does not violate any of the four *Calder* categories, and so is not proscribed by the *Ex Post Facto* Clause. That clause provides the explicit textual source of constitutional

protection against retroactive changes in the law. Accordingly, the *Ex Post Facto* Clause, and not the more generalized notion of substantive due process, must be the guide for assessing petitioner's claim. *See Albright v. Oliver*, 510 U.S. 266 (1994). Independent scrutiny of that claim under the Due Process Clause is foreclosed.

Even if petitioner's claim were separately analyzed under this Court's substantive due process jurisprudence, it would fail. The expiration of a statute of limitations confers no fundamental right or liberty interest; it is simply a public policy about the privilege to litigate. An inviolate right to repose after the statute of limitations has expired, such that a previously-existing cause of action cannot be revived, is not deeply imbedded in our Nation's history and tradition. And although a change in the statute of limitations may affect settled expectations, it is not so implicit in the concept of ordered liberty that neither liberty nor justice would exist if it were permitted. Hence, it does not deny a defendant due process of law unless there is not a rational basis for the law.

California Penal Code section 803(g) was enacted in response to two significant concerns identified by the California Legislature: the need to convict and punish those who sexually abuse children; and the need to prevent the victimization of more children. Section 803(g), which extends the statute of limitations in specified circumstances, is narrowly drawn to effectuate the significant purposes it was designed to serve. The statute, on its face, does not violate the Due Process Clause.

Instead, a defendant may find protection in the procedural component of the Due Process Clause. If he believes he has been prejudiced by a change in the statute

of limitations, he may challenge the prosecution by making a factual showing that the change affects the accuracy or fairness of a determination of his guilt. Any procedural due process claim petitioner may have, however, is not ripe for adjudication.

ARGUMENT

I. A RETROACTIVE CHANGE IN THE STATUTE OF LIMITATIONS THAT REVIVES A PREVIOUSLY-EXPIRED CAUSE OF ACTION IN A CRIMINAL CASE DOES NOT, ON ITS FACE, VIOLATE THE *EX POST FACTO* CLAUSE

Article I, section 10, of the United States Constitution expressly prohibits the states from enacting *ex post facto* laws. This prohibition derives from English common law, well known to the Framers, which drew heavily upon the authoritative exposition of Richard Wooddeson, one of the great scholars of the common law. *Carmell v. Texas*, 529 U.S. 513, 521-22 (2000); *Calder v. Bull*, 3 Dall. 386, 391 (1798). Wooddeson classified *ex post facto* laws by dividing them into three general categories: those respecting the crimes themselves; those respecting the legal rules of evidence; and those affecting punishment, either by creating a punishment or by making an existing punishment more severe. 2 R. Wooddeson, A Systematical View of the Laws of England 621, 624-40 (1742) (Lecture 41) (hereinafter Wooddeson); *Carmell*, 529 U.S. at 523 & n.11.

The proscription stems from the excesses of colonial rulers in using retrospective legislation as a means of political warfare and retribution. *Calder v. Bull,* 3 Dall. at 388-89. It serves "to assure that legislative Acts give fair

warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). It also "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.* at 29; *see also Miller v. Florida*, 482 U.S. 423, 429-30 (1987) (citing *Calder*, 3 Dall. at 389). "The latter purpose has much to do with the separation of powers; like its textual and conceptual neighbor the Bill of Attainder Clause, the *Ex Post Facto* Clause aims to ensure that legislatures do not meddle with the judiciary's task of adjudicating guilt and innocence in individual cases." *Carmell v. Texas*, 529 U.S. at 566 (Ginsburg, J., dissenting) (citing *Weaver*, 450 U.S. at 29 n.10). And, by protecting against legislative abuses, the Clause serves "fundamental justice." *Carmell*, 529 U.S. at 531 n.21.

Shortly after the Constitution was ratified, in *Calder v. Bull*, Justice Chase catalogued the types of criminal laws that implicate the core concern of the *Ex Post Facto* Clause:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

3 Dall. at 390. This formulation "correlated precisely" to Wooddeson's categories, *Carmell v. Texas*, 529 U.S. at 523,

and it has repeatedly been endorsed by this Court as the "exclusive definition of *ex post facto* laws," *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (quoting *Fletcher v. Peck*, 6 Cranch 87, 138 (1810)); *see Carmell*, 529 U.S. at 537-39.

Petitioner asserts that a retroactive change in the statute of limitations violates all four *Calder* categories. (Pet. Br. 6-31.) *Amici curiae* in support of petitioner claim it transgresses the first and fourth categories. (NACDL Br. 5-15.) To the contrary, a change in the statute of limitations, even if applied retroactively so as to revive a previously-expired cause of action, does not fit within any of the four *Calder* categories of proscribed *ex post facto* laws. Nor would barring a retroactive change in the statute of limitations serve any of the purposes of the *Ex Post Facto* Clause.

A. A Retroactive Change in the Statute of Limitations Does Not Violate the First *Calder* Category

The first *Calder* category addresses the universally condemned action by the government of criminalizing conduct that was innocent when done. A retroactive change in the statute of limitations, even if applied so as to revive a previously-expired cause of action, does not do that. Instead, the statute of limitations simply acts as a bar to prosecution, without regard to guilt or innocence.

1. The First *Calder* Category Covers Only Laws That Make Illegal An Act That Was Legal When Committed

According to Blackstone, a law is *ex post facto* when "after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime." 1 W. Blackstone, Commentaries 46, *quoted in Collins v. Youngblood,* 497 U.S. at 44; *Calder,* 3 Dall. at 396 (Paterson, J.). "Here it is impossible, that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had, therefore, no cause to abstain from it; and all punishment for not abstaining, must, of consequence be cruel and unjust." 1 W. Blackstone, Commentaries 46, *quoted in Calder*, 3 Dall. at 396 (Paterson, J.); Chafee, Three Human Rights in the Constitution of 1787, at 96 (1956). This historical reference was discussed by the Framers during debates on the *Ex Post Facto* Clause, and it was deemed an authoritative source of the technical meaning of the term in *Calder*. *Collins v. Youngblood,* 497 U.S. at 44 (citing *Calder*, 3 Dall. at 391 (Chase, J.) and *id.* at 396 (Paterson, J.)).

Justice Chase explained that the "very nature of our free *Republican* governments" is "that no man should be compelled to do what the laws do *not* require; *nor to refrain from acts which the laws permit*." *Calder*, 3 Dall. at 388. Accordingly, it would be an abuse of power for a legislature to enact a "law that punished a citizen for an *innocent* action, or, in other words, for an act, which, when done, was in violation of no *existing* law." *Id.* A legislature may declare new crimes and establish rules of conduct for its citizens in future cases, and they may command what

is right, and prohibit what is wrong, "but they cannot change *innocence* into *guilt*." *Id.*

Justice Chase noted that the Parliament of Great Britain had exercised the power to pass *ex post facto* laws, under the denomination of bills of attainder or bills of pains and penalties. *Calder*, 3 Dall. at 389. As an example of the first category of these laws, which made innocent acts criminal, Justice Chase, like Wooddeson before him, cited the case of the Earl of Strafford in 1641. *Id.* at 389 & n.1; Wooddeson, at 629. Being forced to find a way to dispose of the Earl, Charles I, by bill of attainder, assembled blunders and misdemeanors into a package called "accumulative treason," and then sent the Earl to his death. Wooddeson, at 629-33; *see* Chafee, Three Human Rights in the Constitution of 1787 at 109-13. This law, said Justice Chase, declared acts to be treason "which were *not* treason, when committed," *Calder,* 3 Dall. at 388, and such a law was an *ex post facto* law, in that it "*created . . . the crime* for the purpose of conviction," *id.* at 391 (emphasis added).

A modern example is provided in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), which involved a due process challenge to the judicial creation of a retroactive crime. In *Bouie*, two African-American students were convicted of criminal trespass for participating in a sit-in demonstration in the restaurant area of a store, which was reserved exclusively for whites. Although they were given no notice that the restaurant was reserved for whites when they entered, they were later informed by the police and asked to leave. They refused. In affirming their convictions, the State's high court expanded its construction of the State's criminal trespass statute to cover not only the entry onto another's property after receiving

notice not to do so, but also the act of remaining after receiving notice to leave. *Id.* at 348-49. The students claimed that by applying such a construction to affirm their convictions, the State had punished them for conduct that was not criminal at the time they committed it. *Id.* at 349-50. This Court agreed. "If South Carolina had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of *ex post facto* laws would clearly invalidate the convictions." *Id.* at 362.

The first *Calder* category is concerned with "the criminal quality attributable to an act" as related to "the legal definition of the offense" at the time it occurs. *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). What a legislature may not do is create a new substantive offense by altering the elements that describe the criminal act itself so as to create a crime where there was none before. California did not do so when it enacted Penal Code section 803(g).

2. Retroactive Changes in Statutes of Limitations Do Not Make Illegal Conduct That Was Legal When Committed

a. Under California Law, A Statute of Limitations is Not An Element of the Offense

Petitioner attempts to bring his case within this definition by casting the statute of limitations as an element of a criminal offense under California law. (Pet. Br. i, 13-15, 23-24.) The California Supreme Court, the final arbiter of state law, has said it is not. In that court's words, "the statute of limitations is not an 'element' of the offense insofar as the 'definition' of criminal conduct is

concerned." *People v. Frazer*, 21 Cal. 4th at 760 n.22; *see also People v. Crosby*, 58 Cal. 2d 713, 723-24, 375 P.2d 839 (1962) (quoting *People v. McGill*, 10 Cal. App. 2d 155, 159, 51 P.2d 433 (1935)).

Indeed, if the filing of criminal charges within the statute of limitations were an element of the crime, a defendant could be found guilty only if the prosecution established that fact by proof beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 361-62 (1970). Under California law, however, while the prosecution has the burden of proving that a prosecution was initiated within the statutory period, it need do so only by a preponderance of the evidence. *People v. Zamora*, 18 Cal. 3d 538, 565 n.27, 557 P.2d 75 (1976).

That statutes of limitations are not elements of offenses under California law is hardly surprising. A statute of limitations "operates to preclude the imposition of criminal liability on defendants, notwithstanding a showing that they committed criminal acts." *United States v. Scott*, 437 U.S. 82, 111 (1978) (Brennan, J. dissenting). It is a "nonexculpatory defense," which "bars conviction of an offender even though he may be entirely culpable." 2 Robinson, Criminal Law Defenses, Nonexculpatory Defenses, § 202(b), at 465 (1984), *quoted in People v. Frazer*, 21 Cal. 4th at 758 n.20. By pleading the statute of limitations, a defendant simply asserts that by virtue of an extrinsic condition, which is unrelated to the commission of the offense, he is not subject to prosecution for the crime. And as this Court has explained, "a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word." *Scott*, 437 U.S. at 98 n.11.

Accordingly, this Court has long observed that statutes of limitations are not an element of criminal offenses. *United States v. Cook,* 84 U.S. 168, 181 (1872); *see also Toussie v. United States,* 397 U.S. 112, 115 (1970); *Pendergast v. United States*, 317 U.S. 412, 418 (1943).

The crimes with which petitioner is charged are set forth in California Penal Code section 288. As the California Supreme Court has explained, "[S]ection 288 was enacted in 1901, and the elements defining criminal conduct under what is now subdivision (a) have remained the same for decades. The crime has long involved any touching of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." *People v. Frazer*, 21 Cal. 4th at 758-59 (quotation marks and citations omitted). At no time during the charged period was the touching of an underage child with the intent of arousing the sexual desires of the actor or the child an innocent act, and nothing in California Penal Code section 803(g) changes that. This simply is not a case in which an action "indifferent in itself," 1 W. Blackstone, Commentaries 46, was only later declared to be a crime.

It is true that in California statutes of limitations are, in many respects, jurisdictional in nature and may therefore be raised by defendants for the first time on appeal. *See People v. Williams*, 21 Cal. 4th 335, 337-38, 981 P.2d 42 (1999) (reaffirming general rule that defendant does not waive the statute of limitations by failing to raise it before trial court); *Cowan v. Superior Court*, 14 Cal. 4th 367, 370, 926 P.2d 438 (1996) (permitting defendant to "expressly waive the statute of limitations when . . . the waiver is for his benefit"). But that is utterly beside the point. Statutes of limitations are no more elements of

crimes than are facts bearing on venue, personal jurisdiction, and subject matter jurisdiction – which are not elements of crimes in California or, to our knowledge, in any jurisdiction in the United States. For this reason, the California Supreme Court observed in *People v. Frazer* that "the manner in which California courts have characterized criminal statutes of limitations outside the *ex post facto* context" is not relevant to whether "the statute of limitations is an 'element' of the offense insofar as the 'definition' of criminal conduct is concerned." 21 Cal. 4th at 760 n.22.

b. A Statute of Limitations Is Not the Type of Affirmative Defense That Implicates the First *Calder* Category

In *Collins v. Youngblood*, 497 U.S. 37, this Court explained that the *Ex Post Facto* Clause may be violated if the state "deprives one charged with crime of any defense available according to law at the time when the act was committed." *Id.* at 42 (quoting *Beazell v. Ohio.,* 269 U.S. at 170). The Court made clear, however, that the withdrawal of affirmative defenses does not constitute a discrete, additional category of prohibited *ex post facto* laws. Rather, the rule regarding defenses is "linked to the prohibition on alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission.'" *Collins,* at 50 (quoting *Beazell,* at 169-70). As to the former, the Court specified the breadth of the prohibition: a defense may not retroactively be withdrawn if that would change the definition or elements of the charged crime or if the defense involves an excuse or justification for the underlying conduct. *Collins,*

at 50. A statute of limitations is not the type of defense within the scope of that prohibition.

1. In *Collins v. Youngblood*, Youngblood was convicted in a Texas court of aggravated sexual abuse and sentenced by the jury to life in prison and a $10,000 fine. On collateral review, a state district court held that the sentence was void because Texas law did not permit the imposition of a fine in addition to imprisonment, and the Texas Court of Criminal Appeals had previously held that appellate courts lacked the authority to reform such a verdict. While the State's appeal of the state district court's decision was pending, the Texas legislature enacted a law giving appellate courts that power. Under that authority, the Texas Court of Criminal Appeals reformed Youngblood's verdict by deleting the fine, and it denied his request for a new trial. On federal habeas corpus review, the court of appeals held that retroactive application of the new Texas law violated the *Ex Post Facto* Clause. 497 U.S. at 39-40. This Court reversed.

In reaching its holding, the Court overruled two of its prior decisions, and it clarified *ex post facto* doctrine. The Court previously had ruled that whereas the *Ex Post Facto* Clause was not violated by mere "procedural" changes in the law, it was violated when the state deprived a defendant of "substantial protections with which the existing law surrounds the person accused of crime," *Duncan v. Missouri,* 152 U.S. 377, 382-83 (1894), or if it arbitrarily infringed upon "substantial personal rights," *Malloy v. South Carolina,* 237 U.S. 180, 183 (1915). In *Collins*, the Court concluded that the phrases "procedural," "substantial protections," and "personal rights" confused the inquiry. 497 U.S. at 45. The proper inquiry is simply whether the

retroactive state law falls within one of the *Calder* categories. *Id.* at 41-52. The Court therefore overruled *Thompson v. Utah,* 170 U.S. 343 (1898), which had relied on the concept of "substantial protections," and *Kring v. Missouri,* 107 U.S. 221, 228-29 (1882), which had held that any change that "alters the situation of a party to his disadvantage" violates the *Ex Post Facto* Clause. *Collins,* 497 U.S. at 37-52.

The Court's discussion of *Kring* is particularly pertinent to the present case. In *Kring*, the defendant had pleaded guilty to second-degree murder, pursuant to a plea agreement. After his conviction was reversed on appeal because of an unlawful sentence, the state tried and convicted Kring of first-degree murder. At the time the crime was committed, Missouri law had provided that a plea of guilty to second-degree murder constituted an acquittal of first-degree murder. 107 U.S. at 221-24. This Court held that Missouri's abrogation of the implied-acquittal rule after the crime was committed, but before Kring entered his plea, violated the *Ex Post Facto* Clause because, in denying Kring the benefit of an implied acquittal to which he would previously have been entitled, the change in the law "alter[ed] the situation to his disadvantage." *Id.* at 235.

In *Collins*, the Court stated that *Kring* might be reconcilable with later cases if the change in Missouri law were viewed as depriving Kring of a "defense" to which he previously had been entitled. 497 U.S. at 50. The Court stated, however, that "defenses" protected by the *Ex Post Facto* Clause are defenses linked to the "legal definition of the offense." *Id.* The "defense" available to Kring under earlier Missouri law was not one related to the definition of the crime. Missouri had not changed any of the elements of

the crime of murder or the matters that might be pleaded as an excuse or justification for the conduct underlying the charge. The holding in *Kring,* then, could not stand. *Id.* at 50.

As an example of a case in which a defense could *not* be withdrawn without violating *ex post facto* principles, this Court cited *United States v. Hall*, 26 F. Cas. 84 (D. Pa. 1809). *Collins*, 497 U.S. at 49. There, a vessel owner was sued by the United States for forfeiture of an embargo bond obliging him to deliver certain cargo. As a legal excuse, the defendant asserted that a severe storm had disabled his vessel and forced him to land in Puerto Rico, where he was forced by the Puerto Rican government to sell the cargo. The Court explained that according to the law in effect at the time Hall forfeited the cargo, an "unavoidable accident" was an affirmative defense to a charge of failing to deliver cargo. A later-enacted law, which imposed an additional requirement for the affirmative defense – that the vessel or cargo actually be lost at sea as a result of the unavoidable accident – would have deprived Hall of a defense of his actions available at the time he sold the cargo. It was, therefore, an invalid *ex post facto* law. *Id.* As this Court explained, a law that abolishes an affirmative defense of justification or excuse contravenes the *Ex Post Facto* Clause because it expands the scope of a criminal prohibition after the act is done. *Id.*

The Court in *Collins* concluded that the Texas statute allowing reformation of improper verdicts did not withdraw a defense bearing on the "definition" or "elements" of the charged crime, or a defense involving "an excuse or justification for the conduct underlying such a charge." 497 U.S. at 50. Hence, the statute did not violate the *Ex Post Facto* Clause. Likewise, the withdrawal of a statute of

limitations "defense" does none of these things, and so it is not prohibited.

2. Asserting that a limitations period has expired is certainly a defense in the general sense that it is a defensive measure. More particularly, however, it is a matter in bar of prosecution, which is unrelated to the definition of a crime, *see supra* Part I.A.2.a, and is not pleaded as a nullification of one or more of its elements or as an excuse or justification for its commission. It is, thus, distinguishable from a "pure" defense, which defeats an element of the crime. Because it has nothing to do with the structure of the crime or its elements, a statute of limitations is not the type of "defense" that implicates the first *Calder* category.

In addition, an *ex post facto* violation exists only when the accused is deprived of a defense "available according to law at the time when the act was committed." *Collins*, 497 U.S. at 42, 52; *Beazell v. Ohio*, 269 U.S. at 169-70; *see also Carmell v. Texas,* 529 U.S. at 537. A defense in this sense only encompasses circumstances that existed at the time the crime was committed, which exonerate or mitigate the accused's actions. The statute of limitations is not a defense available at the time the act is committed, nor can it ever be, because it does not relate to the circumstances surrounding the crime, but only relates to the passage of time.[2]

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[2] *See United States v. Brechtel*, 997 F.2d 1108, 1113 (5th Cir. 1993); *United States v. Knipp*, 963 F.2d 839, 843-44 (6th Cir. 1992); *United States v. Bischel*, 61 F.3d 1429, 1435-36 (9th Cir. 1995); *Clements v. United States*, 266 F.2d 397, 399 (9th Cir. 1959); *see also Proctor v. Cockrell*, 283 F.3d 726, 736 (5th Cir. 2002) (upholding statute retroactively shifting

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Although a statute of limitations provides a potential bar to prosecution at a later date, it is "available" only to the extent that, if the State fails to prosecute within a specified period of time, the defendant may invoke it to prevent his prosecution. The incipient nature of a statute of limitations defense at the time the crime is committed makes evident the fundamental difference in purpose and effect between it and a defense of the type described in *Collins*. A statute of limitations has no effect on the criminal nature of an act; a person who is successful in asserting a statute of limitations bar is just as much a criminal as he or she was the day the act was committed. In contrast, "pure" defenses, such as self-defense and heat of passion, are available at the time the crime is committed. Because they relate to an element of the defense, if successful they transform what otherwise would have been a criminal act into something that is not criminal or is of a lesser criminal nature when applied to the defendant.[3]

It is well-settled by both state and federal courts that the statute of limitations may be extended during its term without running afoul of the *Ex Post Facto* Clause. *See People v. Frazer*, 21 Cal. 4th at 760-65 & n.25 (collecting

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the burden of proof to the defendant to establish the statute of limitations as a defense).

[3] Likewise, the State could not retroactively abolish the defense of mistaken identification. Identity, meaning the doing of the criminal act by the defendant, is an essential element of any crime. *United States v. Garcia-Rosa*, 876 F.2d 209, 224 n.12 (1st Cir. 1989); *see United States v. Danzey*, 594 F.2d 905, 911-14 (2d Cir. 1979); *e.g. People v. Hall*, 28 Cal. 3d 143, 158-59, 616 P.2d 826 (1980). Petitioner is therefore wrong in asserting that the State's position would permit legislation that retroactively abolishes that defense. (Pet. Br. 23-24)

cases). But if a statute of limitations is a defense available at the time of the crime within the meaning of the *Ex Post Facto* Clause, then an extension of the statute of limitations prior to its expiration is just as much a violation of *ex post facto* principles as is the revival of an action by a change in the statute of limitations. Neither an extension nor a revival violates the *Ex Post Facto* Clause, however, because in neither case does the new expanded statute of limitations retroactively affect the criminal nature of the act. California Penal Code section 803(g) regulates the time during which child sexual abuse, defined and punished elsewhere in the Penal Code, may be charged; it does not impermissibly withdraw a "defense" within the meaning of the *Ex Post Facto* Clause.

3. Recently, in *Carmell v. Texas*, 529 U.S. 513, the Court examined *Collins* and said nothing to undermine or narrow the holding in *Collins* with respect to the types of defenses protected by the *Ex Post Facto* Clause. The Court in *Carmell* rejected the State's claim that *Collins* had "effectively cast out the fourth *Calder* category." *Id.* at 537-39. To the contrary, held the Court, *Collins* is properly understood as having "eliminated a doctrinal hitch" that had developed in the cases, namely, the dichotomy discussed above between "procedural" changes and changes with respect to "substantial protections." *Id.* at 539. And in eliminating that hitch, stated the Court in *Carmell*, *Collins* reestablished that *Calder*'s four categories are the bounds of the *Ex Post Facto* Clause's protections, beyond which it is a mistake to stray. *Id.*

Carmell did not express any disapproval of the result or reasoning of *Collins* (apart from describing as "cryptic" *Collins*' discussion of the fourth *Calder* category). 529 U.S. at 538. The Court approved of *Collins*' overruling of *Kring*

and *Thompson*, *id.*, and it approved of *Collins*' refusal to create new categories of *ex post facto* laws, *id.* at 539. *Collins*' treatment of defenses remains good law, and it defeats petitioner's contention that section 803(g) contravenes the first *Calder* category.

B. A Retroactive Change in the Statute of Limitations Does Not Violate the Second or Third *Calder* Category

Petitioner's claim that a retroactive expansion of the statute of limitations violates the second and third *Calder* categories (Pet. Br. 25-30) merits little discussion. Those categories prohibit laws that affect punishment, either by creating a punishment or by making an existing punishment more severe. *Carmell*, 529 U.S. at 523 & n.11 (discussing Wooddeson, at 638-39).[4] A change in the statute

[4] Wooddeson placed in the former category those laws "making therein some innovation, or creating some forfeiture or disability, not incurred in the ordinary course of laws." Wooddeson, at 638; *Carmell*, 529 U.S. at 523 n.11. As examples of this category, he cited the bills passed by Parliament that banished Lord Clarendon in 1669 and Bishop Atterbury in 1723. Wooddeson, at 638-39. These were considered "innovation[s] . . . not incurred in the ordinary course of laws" because banishment, at those times, was not a form of penalty that could be imposed by the courts. *Carmell*, 529 U.S. at 523 n.11 (quoting Wooddeson at 639, and citing 11 W. Holdsworth, A History of English Law 569 (1938), and Craies, The Compulsion of Subjects to Leave the Realm, 6 L. Q. Rev. 388, 396 (1890)). Justice Chase cited the same two examples. *Calder*, 3 Dall. 389 n.3.

For an example of a law that fell into the latter category, Wooddeson cited an act passed in Charles the Second's reign against the persons who assaulted and wounded Sir John Coventry, declaring assaults accompanied by personal mutilation a capital felony without benefit of clergy. Wooddeson, at 639. The so-called "Coventry Act" did not displace the common law of mayhem, which had been punishment

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of limitations, standing alone, simply has no bearing on how a crime will be punished, and this is true whether or not the change is applied retroactively.

C. A Retroactive Change in the Statute of Limitations Does Not Violate the Fourth *Calder* Category

There also is no basis for petitioner's contention that California has run afoul of the fourth *Calder* category, which prohibits "Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." *Calder*, 3 Dall. at 390. *Carmell* confirmed that category's continuing existence, but it said nothing that would make the category applicable here.

The paradigmatic example of an act falling within the fourth category is the case of Sir John Fenwick. *Carmell*, 529 U.S. at 526-31. After James II was deposed by King William III in the Revolution of 1688, Fenwick and others who remained loyal to James plotted against William. Before their plan could be carried out, one of the conspirators disclosed the plot to William. With the exception of Fenwick, who went into hiding, the conspirators were apprehended, tried, and convicted of treason. During their

by mutilation, but it provided an increased penalty for intentional maiming and, for the first time, extended the crime to include disfigurement if intentional. Perkins and Boyce, Criminal Law, at 238-43 (3d ed. 1982). Justice Chase used this same example. *Calder*, 3 Dall. at 389 n.4.

trials, it became apparent that there were only two witnesses who could prove Fenwick's guilt. By an act of Parliament, two witnesses were necessary to convict a person of treason. Fenwick's wife succeeded in bribing one of the two witnesses against Fenwick to leave the country; without him, Fenwick could not be convicted under the statute in effect. After the witness's absence was discovered, Parliament passed, and the King signed, a bill making the two-witness bill inapplicable. Fenwick was convicted on the testimony of only one witness, and he was beheaded. *Carmell*, 529 U.S. at 526-31; *Calder*, 3 Dall. at 389 n.2. Parliament's act, according to Justice Chase, violated *ex post facto* principles because it "change[d] the rules of evidence, for the purpose of conviction." *Calder*, 3 Dall. at 391. This Court reaffirmed that conclusion in *Carmell*, in which it stated, "the pertinent rule altered in Fenwick's case went directly to the general issue of guilt, lowering the minimum quantum of evidence required to obtain a conviction." 529 U.S. at 534.

In *Carmell*, the Court reviewed the retrospective application of a Texas law pertaining to sex offenses. Under the law in effect at the time of the defendant's alleged acts, a defendant could not be convicted of specified offenses based upon the testimony of a victim unless the victim's testimony was corroborated by other evidence or the victim informed another person of the offense within six months of its commission. An exception to this requirement applied if the victim was under the age of 14 years. The law further established a sufficiency of the evidence rule respecting the minimum quantum of evidence necessary for conviction. If the statute's requirements were not met (for example, by introducing only the uncorroborated testimony of a 15-year-old victim who did

not make a timely outcry), a defendant could not be convicted and the court was required to enter a judgment of acquittal. After the defendant's alleged crimes were committed, Texas amended the law to extend the child victim exception to victims under 18 years of age. As to four of the charged counts, the amendment was critical; those counts rested solely on the testimony of the victim, who was 14 or 15 years old when they were alleged to have occurred. 529 U.S. at 517-20.

This Court concluded that the circumstances of Carmell's case paralleled those of Fenwick's case. *Carmell*, 529 U.S. at 530. Like that act of Parliament, the Texas amendment violated the *ex post facto* prohibition because it "changed the quantum of evidence necessary to sustain a conviction." *Id.* at 530; *see also id.* at 531, 532-33, 546. The Court explained,

> A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof. In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end. All of these legislative changes, in a sense, are mirror images of one another. . . .

Id. at 532-33 (citation and footnote omitted). The Court concluded that "[t]he relevant question is whether the law affects the quantum of evidence required *to convict*." *Id.* at 551. The answer was yes with respect to the Texas statute at issue in *Carmell*.

When asked in relation to a law that changes the statute of limitations, the answer is no. A change in the statute of limitations does nothing to alter the State's evidentiary burden to prove the commission of the charged offense; it simply regulates the time at which a crime defined and punished elsewhere may be charged. The State still must prove the defendant's guilt by establishing all the elements of the charged crimes that it would have had to prove at the time they were alleged to have been committed, and it still must do so by proof beyond a reasonable doubt. *See People v. Frazer*, 21 Cal. 4th at 760. "The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remain the same." *Beazell v. Ohio*, 269 U.S. at 170. Hence, this is not the type of law that impermissibly attempts to rectify a "deficiency of legal proof" in violation of the fourth *Calder* category. Wooddeson, at 633-34, *quoted in Carmell*, 529 U.S. at 523-24 n.12. Indeed, it is for these same reasons that this also is not the type of law that violates the first *Calder* category, of which it is a "mirror image." *Carmell*, 529 U.S. at 533.

D. The Purposes of the *Ex Post Facto* Clause Are Not Implicated by a Retroactive Change in a Statute of Limitations

As noted at the outset, the *Ex Post Facto* Clause serves to assure that legislative acts give fair warning of

their effect so that individuals may rely on their meaning until explicitly changed, to restrain arbitrary and potentially vindictive legislation through which the legislature would meddle with the judiciary's task of adjudicating guilt and innocence in individual cases, and to ensure "fundamental justice." To hold that a retroactive application of a change in the statute of limitations, as set forth in California Penal Code section 803(g), violates the *Ex Post Facto* Clause would serve none of these purposes.

First, any person in California who committed a lewd act with a child under the age of 14 years during the time period covered by the charged offenses had ample notice that the conduct in which he engaged was illegal and punishable under California law. Moreover, it defies common sense to believe that a person might have committed that crime with the idea in mind that he could escape liability by avoiding apprehension until the expiration of the then-applicable statute of limitations. Even could such an offender sensibly be imagined, there is nothing unjust in disappointing that expectation by changing the period during which he can be prosecuted.

Second, there is no indication that the California Legislature intended to single out either petitioner or any class of defendants for vindictive or arbitrary treatment. Instead, Penal Code section 803(g) was a thoughtful and narrowly tailored response to evidence that young victims of sexual abuse often delay reporting the crimes, leaving their perpetrators free to prey on other innocent children. *See People v. Frazer*, 21 Cal. 4th at 744, 773; *see also infra* Part II.B.2.

Finally, petitioner's generalized claim of unfairness (Pet. Br. 7) is wide of the mark. Any defendant would

presumably find it unfair for the legislature to enact a statute that operates retrospectively to disadvantage him. Yet, as discussed above, this Court has expressly held that the *Ex Post Facto* Clause is not violated merely because a retroactive law "alters the situation of a party to his disadvantage." *Collins,* 497 U.S. at 50 (quoting *Kring v. Missouri,* 107 U.S. at 228-29). To the extent one may consider such laws "unfair" or "unjust," "they do not implicate the same *kind* of unfairness" implicated by the four *Calder* categories. *Carmell*, 529 U.S. at 533 n.23. Such "a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases." *Collins,* 427 U.S. at 50. "Moreover, while the principle of unfairness helps explain and shape the [*Ex Post Facto*] Clause's scope, it is not a doctrine unto itself, invalidating laws under the *Ex Post Facto* Clause by its own force." *Carmell,* 529 U.S. at 533 n.23.

Further weakening petitioner's unfairness argument is the nature of statutes of limitations themselves. Statutes of limitations are an optional form of "legislative grace," which reflect a pragmatic determination that the interests of the State are best served by forgoing prosecution in some cases. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). In this Court's words, "Statutes of limitations find their justification in necessity and convenience rather than in logic." *Id.* "They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim." *Id.*[5]

[5] Petitioner's *amici curiae* contend that *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), supports his contention that a retroactive extension of a statute of limitations is the

(Continued on following page)

Petitioner also fails to recognize that fairness is a relative concept, *Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934), and "justice, though due to the accused, is due to the accuser also," *id.* at 122. "There are few in our society who would argue that child sexual abuse does not cause serious problems for its victims. In addition to physical injury, the psychological effects of victimization on children are far-reaching, negative, and complex." U.S. Department of Justice, When the Victim is a Child, at 15 (1985); *see also infra* Part II.B.2. Victims individually, and society as a whole, are entitled to see the perpetrators of child sexual abuse found accountable and punished. And the children who will become victims of child sexual abuse if perpetrators are allowed to remain free deserve the State's protection. *See infra* Part II.B.2. Fairness to petitioner provides no basis upon which to expand the scope of the *Ex Post Facto* Clause beyond the four *Calder* categories in order that he may avoid prosecution.

sort of unfair legislation barred by the *Ex Post Facto* Clause. (NACDL Br. 20-22.) That decision, however, addressed only the narrow question whether, in light of the statutory presumption against retroactivity, a statute that "essentially create[d] a new cause of action" under the False Claims Act should be construed as applying retroactively. *Id.* at 950. The Court held it should not. *Id.* at 952. The Court in *Hughes Aircraft Co.* did not apply the doctrine of constitutional doubt or otherwise premise its decision in any way on constitutional concerns.

II. A RETROACTIVE CHANGE IN THE STATUTE OF LIMITATIONS THAT REVIVES A PREVIOUSLY-EXPIRED CAUSE OF ACTION IN A CRIMINAL CASE DOES NOT, ON ITS FACE, VIOLATE THE DUE PROCESS CLAUSE

A. The *Ex Post Facto* Clause, Not the More Generalized Notion of Substantive Due Process, Governs the Constitutional Inquiry

The Due Process Clause of the Fourteenth Amendment contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions regardless of the procedures used to implement them. *Daniels v. Williams*, 474 U.S. 327, 337 (1986). Petitioner, referencing a "fundamental right of liberty" (Pet. Br. 33) and "the substantive nature of the right" (Pet. Br. 40), asks this Court to find that a retroactive change in the statute of limitations in a criminal case violates substantive due process. This contention fails at the threshold because the Due Process Clause cannot be read to provide greater protections against *ex post facto* laws than the *Ex Post Facto* Clause itself.

When a particular constitutional amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). The Court recently reiterated this principle in *Sattazahn v. Pennsylvania*, 537 U.S. ___ (2003), in which it stated that "[a]t bottom, petitioner's due-process claim is nothing more than his double-jeopardy claim in different clothing,"

and it declined his "invitation to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause," *id.* at ___ (slip op. at 14-15).

This principle is applicable in the instant case. The Framers of the Constitution considered the matter of retroactive changes in the law, and they drafted the *Ex Post Facto* Clause of Article I, section 10, to address it. That clause speaks to the circumstances under which penal laws, "whatever their form," may be "altered by legislative enactment, after the fact, to the disadvantage of the accused." *Beazell v. Ohio*, 269 U.S. at 170. It provides an "explicit textual source of constitutional protection" against retroactive legislative changes in criminal law, and so it is not to be supplemented through the device of "substantive due process." *Graham v. Connor*, 490 U.S. at 395. There is no reason for this Court to turn away from this prior jurisprudence, and to create a new due process right that duplicates a right that is readily identifiable in the Constitution's text and overlaid with case law governing its scope.

B. A Change in the Statute of Limitations Does Not Deny a Defendant Substantive Due Process

Petitioner's due process claim fares no better when analyzed in light of this Court's substantive due process precedents. The substantive content of the Due Process Clause "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Washington v. Glucksberg*, 521 U.S. 702,

719-20 (1997). Protected are those fundamental rights that are "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg,* 521 U.S. at 720-21 (citations and quotation marks omitted).

The Court has "always been reluctant to expand the concept of substantive due process." *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992); *Albright v. Oliver*, 510 U.S. at 271-72 (observing that defendant's claim of a substantive due process right to be free of prosecution without probable cause was "markedly different" from those matters – relating to marriage, family, procreation, and the right to bodily integrity – that, for the most part, have been accorded this protection). By extending constitutional protection to an asserted right or liberty interest, the Court, to a great extent, places the matter outside the arena of public debate and legislative action. *Washington v. Glucksberg,* 521 U.S. at 720. It appears, however, that petitioner would have this Court do just that, and find that a criminal defendant has a new fundamental right, protected by the Due Process Clause, in retaining the benefit of an expired statute of limitations against subsequent attempts to amend the time during which criminal charges may be filed. The Court should decline that suggestion.

1. The Expiration of a Statute of Limitations Confers No Fundamental Right or Liberty Interest

In *Chase Securities Corporation v. Donaldson*, this Court held that the shelter of a statute of limitations, "which represent[s] a public policy about the privilege to

litigate," has "never been regarded as what now is called a 'fundamental' right," 325 U.S. at 314, and retroactive application of a change in the statute of limitations does not, per se, violate the Due Process Clause, *id.* at 314-16 (discussing *Campbell v. Holt*, 115 U.S. 620 (1885)). The Court affirmed this holding in *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976). Petitioner attempts to distinguish these cases by asserting that in California a criminal statute of limitations creates a substantive right, in contrast to a remedy or a procedural right, which was at issue in *Chase*. (Pet. Br. 49-50 & n.47.) This contention is meritless.

a. For a time, this Court did distinguish between civil statutes of limitations, involving only procedural rights, and statutes of repose, involving substantive rights. *Compare Chase,* 325 U.S. 305, *with William Danzer & Co. v. Gulf & Ship Island R.R. Co.*, 268 U.S. 633 (1925). But this Court's more recent line of cases directs a different approach.

In *Usery v. Turner Elkhorn Mining Company*, 428 U.S. 1 (1976), the Court rejected a due process challenge to legislation that created a new liability upon coal mine operators for illnesses to miners for work done long before the legislation. Even though the effect of the legislation was to impose a new duty or liability based on past acts, the Court held, the burden was on the one complaining of a due process violation to establish that the legislature had acted in an arbitrary and irrational manner. *Id.* at 15-16. And in *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717 (1984), the Court upheld a statute imposing liability on employers for withdrawal from pension plans, even though the statute applied to employers who withdrew before the statute was enacted.

Relying on *Turner Elkhorn,* the Court held that legislation imposing liability retroactively need only be supported by a rational legislative purpose. *Id.* at 728-30. These cases and their progeny direct that retroactive application of a statute will not be found to violate due process if it serves a legitimate legislative purpose that is furthered by rational means. *See also Eastern Enters. v. Apfel*, 524 U.S. 498, 524-28 (1998); *United States v. Carlton*, 512 U.S. 26, 30-31 (1994); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). In other words, whether a change in a statute of limitations is a matter of procedure or substance, whether it affects a right or a remedy, neither liberty nor justice is sacrificed by a change that permits the filing of cases after the expiration of the previously-existing statute of limitations.

As this Court has made clear, "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 16 (citations omitted). "Moreover, the detrimental reliance principle is not limited to retroactive legislation. An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process." *United States v. Carlton*, 512 U.S. 33-34.

b. In *Chase*, the Court explained that a defendant "may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Id.* Nothing

in the history of statutes of limitations in criminal cases justifies a different conclusion here.

At common law, there was no limitation of time for prosecuting a crime. 21 Am. Jur. 2d Criminal Law § 291, at 346 (1998); 1 Wharton's Criminal Law § 92, at 628 (15th ed. 1993); *see United States v. Marion*, 404 U.S. 307, 317 (1971). Then, as now, in the absence of a statutory limitation, a prosecution could be brought at any time following the commission of an offense. *See* 21 Am. Jur. 2d Criminal Law § 291, at 346. Although federal and state statutes regulating the time for bringing criminal charges have existed since the adoption of the United States Constitution, "their popularity in this country has been viewed as somewhat of a mystery." *People v. Frazer*, 21 Cal. 4th at 770 n.30.

Sometime prior to 1881 "Mr. Bishop in his treatise on Statutory Crimes, section 266," stated that "a criminal statute of limitations simply withholds from the courts jurisdiction over the offence after the specified period, and it is competent for the legislature to revive the old jurisdiction or create a new one, when the prosecution may proceed." *See Moore v. State*, 43 N.J.L. 203, 213 (1881). To our knowledge, it was not until 1881 that a court in this country disagreed with Mr. Bishop and held that a legislature could not retroactively extend a statute of limitations without violating the federal *Ex Post Facto* Clause. *Id.* at 214-25. In the ensuing 120 years, with the exception of recent cases construing California Penal Code section 803(g), it appears there have been only two cases in which the courts reached the same conclusion, and both of those were decided in the past 20 years. *See People v. Frazer*, 21 Cal. 4th at 765 & nn.27, 28 (collecting cases).

There is no settled, long-standing tradition with respect to the retroactive extension of a statute of limitations in criminal cases. Hence, "historical practice" does not provide a basis for finding that the shelter provided by a statute of limitations is a fundamental right or liberty interest, so that a legislature is prohibited by the Due Process Clause from amending it to restore a state's right to prosecute a criminal defendant. *Compare, e.g., Washington v. Glucksberg*, 521 U.S. at 723 ("To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.").

In the context of civil law, this Court has found retroactive extensions of statutes of limitations to be consistent with the Due Process Clause, and the reasons underlying those decisions compel the same result in criminal cases. It cannot be said that California Penal Code section 803(g), on its face, deprives a defendant of a fundamental right that is both "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Washington v. Glucksberg,* 521 U.S. at 720-21 (citations and quotation marks omitted). Hence, it does not deny a defendant due process unless there is not a rational basis for the law. *See id.* at 722.

2. California Penal Code Section 803(g) Serves a Legitimate State Interest That Is Furthered By Rational Means

Petitioner has not claimed, nor could he successfully, that California Penal Code section 803(g) fails to serve a legitimate legislative purpose that is furthered by rational means.

a. Beginning in the late 1980's, lawmakers across the country became increasingly aware that young victims often delay reporting sexual abuse. *People v. Frazer*, 21 Cal. 4th at 744. The California Legislature responded by enacting California Penal Code section 803(g) in 1994. *Id.* at 744-47. The statute "was based on the assumption that past and future sex crimes against children, even though subject to corroboration by independent evidence, would otherwise go unpunished given the difficulty young victims experience remembering and reporting such events, and their emotional vulnerability at the hands of adult perpetrators, including those in positions of trust." *Id.* at 773.

Two years later, after several courts held the law was not intended to be applied retroactively, the Legislature reexamined the issue, when a bill was introduced to expressly make the law apply retroactively. *People v. Frazer*, 21 Cal. 4th at 745-47 & n.7. The legislative analysis noted the justification for the bill: "Because many victims do not bring the crime to the attention of law enforcement until many years later, when the statute of limitations has already expired, their molesters go unpunished. This bill appropriately allows law enforcement to seek justice and ensure other children do not become victims in the future." Analysis of A.B. 2014 (Boland) for Cal. Asm. Comm. on Public Safety hearing, April 9, 1996, at 3.[6] The bill became law by a vote of 100 to one. A.B. 2014 (Boland), 1995-96 Sess.; Ch. 130, Stats. 1996.[7]

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[6] Available at http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_2001-2050/ab_2014_cfa_960408_114032_asm_comm.html.

[7] California Assembly vote available at http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_2001-2050/ab_2014_vote_960624_0110PM_asm_floor.

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The California Legislature's assumptions in making Penal Code section 803(g) apply retroactively are supported by significant scientific literature. The majority of victims of childhood sexual abuse in retrospective surveys had never told anyone of the abuse during their childhood. Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, Child Abuse and Neglect 173, at 181 (1992). Rates of non-disclosure run between 33 percent and 92 percent for women, and between 42 percent and 85 percent for men, and these numbers may be conservative. Lyon, *Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation*, in Conte, Critical Issues in Child Sexual Abuse, at 114 (Sage Publications 2002). Delays in reporting were most likely when the offender was related to the child, when the abuse was more serious than fondling, and when compliance was obtained through threat or manipulation. *Id.* at 116. The most commonly reported reason for non-disclosure by child molestation victims was fear: fear of being harmed or punished, fear of harm to a loved one, or fear of harm to the perpetrator. In addition, many child abuse victims wanted to forget the abuse, thought no one would believe them, feared negative reactions from family members, and had feelings of guilt, self-blame, stigmatization, and isolation. *Id.* at 117-20.

Most published studies indicate that a history of sexual abuse is associated with subsequent psychological dysfunction in adulthood. Briere & Runtz, *Post Sexual Abuse Trauma: Data and Implications for Clinical Practice*, 2 Journal of Interpersonal Violence, at 367-79 (1987).

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html; California Senate vote available at http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_2001-2050/ab_2014_vote_960620_1044AM_sen_floor.html.

Adult survivors are more anxious, have more disassociative and somatic symptoms, and suffer lower self-esteem. They also are at significantly higher risk of developing depression, various anxiety disorders, substance abuse disorders, and sexual dysfunction. High rates of sexual abuse are found in the histories of patients diagnosed with conversion reactions, suicidal tendencies, self-mutilation, multiple personality disorder, borderline personality, chronic pelvic pain, and women with eating disorders. Childhood sexual abuse also is found in the history of a large percentage of adolescent prostitute and runaways. A sizable minority of sexual abuse victims develop post-traumatic stress disorder. 1 Myers, Evidence in Child Abuse and Neglect Cases, § 4.2 at 221-23 (2d ed. 1992); Urquize & Capra, *The Impact of Sexual Abuse: Initial and Long-Term Effects*, What If the Victim is Male? The Assessment and Treatment of the Sexually Maltreated Male (Lexington Books, 1990); Browne & Finkelhor, *Initial and Long-Term Effects: A Review of the Research*, A Sourcebook on Child Sexual Abuse (Sage Publications, 1986).

Significantly, child molesters pose a substantial risk of reoffending throughout their lives. *See* Hanson, et al., *Long-Term Recidivism of Child Molesters*, Journal of Consulting and Clinical Psychology, Vol. 61, No. 4, at 646-52 (1993). In one long-term study, 42 percent of the offenders were reconvicted for sexual crimes, violent crimes thought to be associated with sexual offenses, or both. Although the greatest risk appeared to be during the first five to 10 years, 23 percent of the recidivists were reconvicted more than 10 years after they were released from prison. The authors noted it was likely the reconviction rates underestimated the rate of reoffending, since it is widely recognized that only a fraction of sexual offenses

against children results in the offender's conviction. *Id.* Another long-term study showed the recidivism rate for new sexual offenses was 52 percent, with the approximate underestimation of recidivism being around 20 percent for sexual offenses. Prentky, et al., *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, Law and Human Behavior, Vol. 31, No. 6, at 651 (1997).

The vulnerability of child sexual abuse victims, the difficulties they experience in reporting the crimes, and the recidivistic nature of their perpetrators are evidenced in prosecutions that have been commenced pursuant to California Penal Code section 803(g). Unfortunately, the testimony of petitioner's daughters, given at the grand jury hearing in this case, is not atypical.

Petitioner's older daughter testified that he began molesting her as far back as she could remember, when she was no older than five. (RT 107-08.) He orally copulated her, digitally penetrated her, had intercourse with her, and had her orally copulate him. (RT 109-10.) For a time, the acts occurred on an almost-daily basis, but they became less frequent as she grew into her late teens. (RT 111-13.) At about that time, she became aware that petitioner was sexually abusing her sister, who was nine years younger than she. (RT 96, 114-15.) She did not tell anyone about the abuse because she was afraid of her father, she did not believe anyone would help her, and she felt dirty. (RT 115-16.) Later, after she got away from the abuse, she did not want it to infect her new life. (RT 116.)

Petitioner's younger daughter testified that he began molesting her when she was four or five years old. When she saw him masturbating, he told her to orally copulate him, which she did. (RT 44-45.) She did not tell anyone

because she was scared. (RT 45.) Thereafter, he sexually abused her two or three times a week. Initially, he sodomized her, which made her feel like she was "being ripped open," and he played with her vagina, and his fingernails made her feel "like a razor blade was cutting [her] vagina." (RT 45-46.) As she got older, he had intercourse with her. (RT 47.) At 16, when she became pregnant by petitioner or her brother, who also had begun molesting her, she moved out and had an abortion. (RT 47-48.)

She had not reported the crimes because petitioner told her it was a secret, she was terrified of him, and she thought it was "a normal way of life." (RT 56-57, 68.) Even after she moved out, she was afraid to tell anyone, and she did not think she would be believed. (RT 57, 61.) She also wanted to pretend everything was normal in her life and that she had wonderful parents. (RT 60.) She did not report the molestations until she was an adult, when she was told that her brother had been molesting his stepdaughter, whom petitioner also had tried to molest. (RT 51-55.) She finally disclosed the abuse because she believed it necessary to protect other children. (RT 70.) After her disclosure, the police contacted her sister, who admitted petitioner had abused her also. Had the police not contacted her, the older sister would not have reported the crimes. (RT 116-17.)[8]

Thus, California Penal Code section 803(g) focuses on two concerns: the need for society in general, and the victims of substantial sexual abuse in particular, to see

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[8] Petitioner has not been convicted of these crimes, of course, but they are the factual basis for the grand jury's indictment.

child sexual abusers convicted and punished for their crimes; and, perhaps more important, the need to stop perpetrators of substantial sexual abuse of a child from victimizing more children. Neither of these problems could have been adequately addressed by a prospective change in the statute of limitations.

b. "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber*, 458 U.S. at 757. The California Legislature reasonably determined that the policies underlying statutes of limitations needed to yield to these more compelling considerations.

The statute is narrowly drawn to effectuate the significant purposes it was designed to serve, while protecting against oppressive use. It is strictly limited to permit prosecution of only the most serious types of sexual abuse of a child: vaginal penetration or rectal penetration by a penis or a foreign object; oral copulation; and mutual masturbation. Cal. Pen. Code §§ 803(g)(2)(B), 1203.066(b). Following receipt of a report from the victim, the State must investigate and file charges promptly, because any prosecution must be initiated within one year of the victim's report. Cal. Pen. Code § 803(g)(1). Charges may be filed only if there is "independent evidence that clearly and convincingly corroborates the victim's allegation." Cal. Pen. Code § 803(g)(2)(B). "No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial," and "[i]ndependent evidence

does not include the opinions of mental health professionals." *Id.*

In addition, a defendant has the protection afforded by procedures in California law to protect the defendant in any prosecution brought under an exception to the normally-applicable statute of limitations. *See People v. Zamora*, 18 Cal. 3d at 561-65 & nn.25-26; *People v. Crosby*, 58 Cal. 2d 713. Among those are the right of the defendant to contest the evidence at a pretrial hearing before a neutral judge, who cannot sustain the prosecution unless he or she finds the State has carried its burden of establishing the requirements of California Penal Code section 803(g) have been met. *See Zamora*, 18 Cal. 3d at 563 n.25; *Crosby*, 58 Cal. 2d at 725.

Penal Code section 803(g) serves not just a legitimate, but a compelling, state interest, which is furthered by rational means. In fact, the means chosen by the California Legislature were so carefully tailored to respond to that compelling interest that the statute survives even strict scrutiny. The statute, on its face, does not deny a defendant due process of law.

C. Petitioner's Right to A Fair Trial is Protected by Procedural Due Process

For the reasons discussed above, the lifting of a statute of limitations so as to restore a right of prosecution that was lost by the mere passage of time does not, per se, deny a defendant due process of law. That does not mean the Due Process Clause does not provide a criminal defendant some measure of protection. That protection, however, comes by way of the procedural, rather than the substantive, component of the clause.

Petitioner implies, for example, that a defendant charged pursuant to California Penal Code section 803(g) will be unable to get a fair trial because his ability to obtain reliable evidence will be impaired, as will be his ability to demonstrate the significance of that evidence, in the abstract. (Pet. Br. 43.) He has no cause for worry. A defendant who believes he or she has been prejudiced by a change in the statute of limitations, whether or not it is applied retroactively, may challenge the prosecution by making a factual showing that the change in the statute of limitations affects the accuracy or fairness of a determination of his guilt or that it obviates or avoids procedures that are necessary for preventing miscarriages of justice, thereby entitling him or her to dismissal of the charges. *See United States v. Lovasco,* 431 U.S. 783, 796 (1977); *People v. Frazer*, 21 Cal. 4th at 773-75. Speculative loss of evidence is insufficient, however; as this Court has noted, "proof of actual prejudice" to the defense is necessary to prevail on a due process claim. *Lovasco*, 431 U.S. at 789; *United States v. Marion*, 404 U.S. at 324.

This aspect of the Due Process Clause also addresses the concerns expressed by petitioner and his *amici curiae* that a criminal defendant may have relied, to his detriment, on the expiration of the statute of limitations by, for example, giving self-incriminating testimony in the belief that he could not be prosecuted. (Pet. Br. 39; NACDL Br. 26-27.) *Raley v. Ohio*, 360 U.S. 423 (1959), is on point. There, the defendants refused to answer questions put to them by the Ohio Un-American Activities Commission, which actively misled them into believing they could assert the privilege against self-incrimination. This Court held that to convict a citizen for exercising a privilege that the State clearly told him was available to him would be to

sanction the most indefensible form of entrapment, in violation of the Due Process Clause. *Id.* at 425-26, 438.

Because of the procedural posture of the case, which is before this Court on the basis of his demurrer, petitioner has not demonstrated prejudice. Hence, any procedural due process claim he may have is not ripe for adjudication. But the availability of the protections afforded by the procedural component of the Due Process Clause are more than adequate to protect his right to a fair trial.

CONCLUSION

The judgment of the Court of Appeal of California should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
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No. 01-1757

In The Supreme Court of the United States

MARION REYNOLDS STOGNER, Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF FOR PETITIONER

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SUMMARY OF THE ARGUMENT

The law that assured Petitioner and all persons similarly situated that the State could not prosecute let alone convict is no longer true so long as Penal Code Section 803(g) is sanctioned. The result is that 803(g) removes protections afforded to Petitioner and requires him to defend long after he was told otherwise, denies him the repose to which he is invested and has at times placed him in physical custody. The same result will apply to those similarly situated, and as the United States Solicitor General makes clear, once the power is sanctioned, the scope of this retroactive application knows no bounds. Thus every American is at risk of tremendous uncertainty in the finality of potential criminal prosecution, of relying on this finality to their detriment and of being exposed to the fundamentally unfair prosecution they were promised would *never* occur.

The State asks this Court to erase the legal landscape it has created through its legislative and judicial branches[1], to ignore the inherent finality accorded Statutes of Limitations which trigger double jeopardy and permit compelled testimony, and to lower this once insurmountable bar to prosecution. Yet, to do so would tear the meaning of the *Ex Post Facto* Clause from its moorings of notice, reliance and fundamental fairness.

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[1] "This Court, in applying the ex post facto prohibition of the Federal Constitution to state laws, accepts the meaning ascribed to them by the highest court of the state. But when there meaning is thus established, ... whether the ... standard is more onerous ... within the meaning of the constitutional prohibition, [is a] federal question[] which this Court will determine itself." *Lindsey v. Washington*, 301 U.S. 397, 400 (1937).

Rather, the State asks this Court to consider the matter without reference to California law that has always promised that the passage of time ends the government's ability to prove or punish a public offense. In 1994, the State abruptly and without prior notice, began rewriting the law which was ultimately sanctioned in *People v. Frazer*, 21 Cal. 4th 737 (2000). This law was applied to Petitioner in *Stogner v. Superior Court*, despite specific legislation designed to protect his right.[2]

The *Frazer* Court separated the effect a completed Statute of Limitation had on the crime, the court's jurisdiction, and the punishment and turned instead to a version of *ex post facto* protections excluding certain *Calder* categories and viewing the Clause as only concerned with individual reliance which it found missing in the case before it. The court decided in the narrowest sense that the Statute of Limitations did not violate either prong of its limited definitions. In so doing, the State reneged on its invitation to citizens to reform and to invest in their freedom by rebuilding their lives, participating in their communities, building homes and families, working, and, ultimately, letting their guard down from the threat of prosecution. In short, the law invited reliance on its finality.

"There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533 (2000). In its legislative capacity, the State creates, extends and eliminates both civil and criminal Statutes of Limitation. Whether the legislature may in limited civil

[2] Penal Code section 805.5, if strictly construed, would bar the application of Penal Code section 803(g) to Petitioner.

circumstances revive time-barred causes of action[3] is not relevant here. For its role in the civil arena is, for all involved, as benefactor, providing as an impartial arbiter a forum for equally situated private parties to litigate their differences. There is no intent to favor either party. Wharton's Criminal Law § 444a (7th ed. 1874).

The motive underlying a statute designed to revive time barred criminal prosecutions could not be more different. Wharton, *supra*; *see also People v. McGee*, 1 Cal.2d 611, 613 (1934). Here the State acts in its prosecutorial role. The State is not a neutral arbiter merely providing a forum for litigants; it is a party with a vested interest in the outcome. Wharton, *supra*. It is in this role that the State is most exposed to the heated emotions of the masses. *See Calder v. Bull*, 3 U.S. 386, 389 (1798); *Fletcher v. Peck*, 10 U.S. 87, 137-8 (1810). It is here that the ground for arbitrary action is most fertile. It is in this context that Penal Code Section 803(g) or any revival statute must be analyzed. In relation to Petitioner[4] and those similarly situated, all vestiges of the State as benefactor vanish.

It was with this backdrop that "[t]he *Ex Post Facto* Clause was designed as 'an *additional* bulwark in favour of personal security of the subject' to protect against the 'favorite and most formidable instruments of tyranny' that were 'often used to effect the most detestable purposes'." *Carmell v. Texas*, 529 U.S. at 532.

[3] *See Campbell v. Holt*, 115 U.S. 620, 629 (1885); *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945).

[4] Petitioner is a retired 74 year old veteran of the Armed Forces. Petition to California Supreme Court, PT. XVII. He has limited economic resources, no criminal record, and has been incarcerated several times on this case. *Id.* His health is failing and he recently suffered a stroke. Dr. Duong Letter, October, 28, 2002.

Fundamental fairness, including the prevention of arbitrary and vindictive laws, underlies both the *Ex Post Facto* and the Due Process Clauses. *See Lynce v. Mathis*, 519 U.S. 433, 439-40 (1997); *Bouie v. City of Columbia*, 378 U.S. 347 (1964). While the analysis and the reach of these two Clauses differ, both seek to maintain fundamental fairness in the law. *See Marks v. United States*, 430 U.S. 188, 191-92 (1977); *Bouie v. City of Columbia*, 378 U.S. at 353-4; *Rogers v. Tennessee*, 532 U.S. 441 (2001). Here, the Due Process inquiry is triggered by the State's encroachment on Petitioner's State guaranteed liberty.

Defendant has never been charged with any other criminal wrongdoing, and by 1976, Petitioner was free from the threat of this prosecution. Thus he was free from pretrial incarceration, free from handcuffs and shackles, free from the shame, humiliation and stigma associated with criminal charges, free from the financial and emotional costs of enduring a criminal prosecution and free from potential conviction and punishment. Surely it is this very freedom ranked as fundamental under the Due Process Clause of the United States Constitution. Nevertheless, the State has acted retroactively to deprive the Petitioner of this very freedom in a manner that violates both the Due Process and *Ex Post Facto* Clauses of the United States Constitution.

ARGUMENT

I. Penal Code Section 803(g) Violates the *Ex Post Facto* Clause

Drawing on a history steeped in instances of arbitrary and wanton legislative conduct, Justice Chase created the four *Calder* categories, legal constructs in which many factual scenarios could properly reside.

Calder v. Bull, 3 U.S. at 390-1. He used famous historical examples to illustrate past governmental abuses the *Calder* categories were designed to prohibit.

These examples targeted three distinct areas: *Calders* one and two prohibited laws respecting the crime; *Calder* three prohibited laws that affect the punishment; and *Calder* four prohibited laws respecting the legal rules of evidence. *Carmell v. Texas*, 529 U.S. at 522-23, citing 2 R. WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 625-640 (1792) (Lecture 41). While some governmental action may violate more than one category, there is no evidence that Justice Chase ever intended the examples to limit the individual categories to a particular set of facts. Perhaps aware that such an interpretation might be given to his exposition, Justice Chase made clear that the examples were not meant to be finite but included "these and similar laws." *Calder v. Bull*, 3 U.S. at 391.

For instance, the significance of Sir Fenwick's case was not limited by the fact that it involved a Bill of Attainder but that it represented a situation in which retroactive alterations in evidentiary rules would violate the *Ex Post Facto* Clause. Nor did the factual circumstances underlying the Coventry Act of 1670[5] define the outer limits of *Calder* category three. For the Clause not only bars the imposition of a punishment greater than what existed at the time of offense but also prohibits retroactive revision of sentencing guidelines resulting in a greater sentence (*see Miller v. Florida*, 482 U.S. 423, 435-36 (1987)), prohibits the retroactive

[5] The Coventry Act of 1670 was enacted after John Coventry was assaulted in retaliation for supposed obnoxious statements made by him at Parliament. Individuals took it upon themselves to slit his nose. The law elevated the crime of mayhem to a felony without the benefit of clergy, transforming it for the first time into a capital offense. *See* 4 Blackstone's Commentaries 207; *see also* 2 Wooddeson's Lectures 638-39.

removal of a sentencing statute providing the potential to receive a lesser sentence (*see Lindsey v. Washington*, 301 U.S. 397, 401-402 (1937))and prohibits retroactively canceling provisional early release credits resulting in petitioner's re-arrest and re-incarceration. *See Lynce v. Mathis*, 519 U.S. 433, 445-6 (1997).

Thus the historical examples guide rather than limit, illustrate rather than define. They stand as a reminder of the ever-present potential for arbitrary and oppressive responses to emotional times. They underscore the mainstay of the *Ex Post Facto* Clause: fundamental justice. *See Carmell v. Texas*, 529 U.S. at 533.

Laws Respecting Evidence

California jurisprudence has instructed that failing to present evidence to show compliance with the Statute of Limitations is fatal to the prosecution. Penal Code section 803(g) reverses this result.

The California Supreme Court's decision in *People v. Frazer*, 21 Cal.4th 737 (1999), decided before *Carmell*, misconstrued *Collins* to narrow the original four *Calder* categories to two: "*Collins* made clear that the two categories of impermissible retroactive legislation–redefining criminal conduct and increasing punishment–are exclusive." *People v. Frazer*, 21 Cal.4th at 756. However, just two terms ago, this Court reaffirmed the existence of the fourth *Calder* category, (*Carmell v. Texas*, 529 U.S. at 537-8), and reestablished its position among those prohibitions which may *not* be evaded. *See Collins v. Youngblood*, 497 U.S. 37, 46 (1990).

By reviving the Statute of Limitations, Penal Code section 803(g) permits the government to overcome an evidentiary burden that previously barred its prosecution. Through 803(g), the State seeks in its

current prosecution to present different testimony—testimony that no more than a year has passed since the initial report to law enforcement—rather than testimony that three years has not passed from the dates of the original allegations. Previously, the State's burden regarding the Statute of Limitations in Petitioner's case was impossible to meet. This is precisely what was thus prohibited in *Carmell*: the government may not alter the rules of evidence to admit less or different testimony for the purpose of securing a conviction. *See Carmell*, 529 U.S. at 530-1.

California jurisprudence places the burden of disproving the expiration of the Statute of Limitations in all stages of a criminal prosecution, from pleading to trial on the government.[6] The State now changes the evidentiary burden previously required to secure a conviction against Petitioner. Had charges been brought as the law provided until *Frazer*, the State would have had to produce testimony that the prosecution was not barred by the Statute of Limitations; testimony it would not have been able to produce. It has now relieved itself of that burden. Just as in *Carmell* and the case of Lord Fenwick, the State has altered its rules to secure a conviction.

Petitioner's situation however differs from *Carmell*

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[6] *See, e.g. People v. Crosby*, 58 Cal.2d 713, 724-5 (1962); *People v. Hoffman*, 132 Cal.App. 60, 62-3 (1933); *People v. Le*, 82 Cal.App.4th 1352, 1362 (2000). "In order to hold a defendant over for trial the People bear the burden of producing evidence (either before the grand jury or at the preliminary hearing) which demonstrates that there is probable cause to believe that the prosecution is not barred by the statute of limitations." *People v. Zamora*, 18 Cal.3d 538, 565, n.26 (1976); *People v. Crosby*, 58 Cal.2d 713, 725 (1962) (same). *People v. Le*, 82 Cal.App.4th 1352, 1360-1 (defendants were entitled to an acquittal where the prosecution had failed to present evidence at trial that the case was not barred by the Statute of Limitations).

and Fenwick in that he has relied on the freedom afforded under the Statute of Limitations. For nearly three decades, Petitioner has invested in a life free from prosecution. He is a veteran. He has no criminal record. If Petitioner had been charged, convicted and sentenced within the relevant statutory period, in all likelihood he would have served his time and been returned to his community over twenty years ago.

Laws Respecting the Crime

California invites the Court to examine this matter without reference to its own laws, the same laws that give notice to its citizenry. Through Penal Code Section 803(g), it endeavors to go back in time to raze its own legislation and judicial rulings. It asks this Court to undo what it has done by its own hand and what it has promised Petitioner and others similarly situated that it would not do.

The State rather than relying on its own laws, redefines them, assuring us that its actions are justified by its good intentions. The State's intentions however are irrelevant; the proper focus in *ex post facto* analysis is on the results to Petitioner and others similarly situated.[7] *See Lynce v. Mathis*, 519 U.S. 433, 442 (1997).

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[7] Respondent and Amici spend much time emphasizing the "salutary purpose" of 803(g) as a measure to deal with child molestation. In *ex post facto* analysis they miss the point. It is the harm to Petitioner and all similarly situated that is the relevant consideration. In *Lynce*, a unanimous decision of this Court, in which seven Justices joined the opinion, and two concurred in the result, the Defendant was awarded credits, part of which were applied to him pursuant to a statute which was enacted after his crime was completed. *See Lynce v. Mathis*, 519 U.S. at 449. Nevertheless the court made clear that the focus of the *ex post facto* clause was the resulting harm to the defendant and not the legislature's intent of relieving overcrowding: "In arriving at our holding in *Weaver* we relied not on the subjective motivation of the legislature in enacting the gain-time credits, but rather on whether objectively the new statute "lengthen[ed] the period that someone in petitioner's position must spend in prison." *Id.* at 442.

Through its laws the State has repeatedly reaffirmed that, the passage of time extinguishes the public offense.[8] *See, e.g., People v. McGee*, 1 Cal.2d 611,

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[8] The Attorney General and Solicitor General argue that *ex post facto* concerns are not implicated here because the conduct was not "innocent when done" and because, the Attorney General argues, the Statute of Limitations is not an element of an offense where the government's burden of proof at trial is a mere preponderance of the evidence.

The recitation to Strafford as an example of acts that were not treasonous when done is but one tenant to be learned from the Earl's plight. It is not the only one. A historical event can, of course, account for more than one principle of law. *See Carmell v. Texas, 529 U.S. at 536.* It stands to reason therefore that such an event can also stand for more than one example of an *ex post facto* law.

The House of Commons sought to convict Strafford on twenty-eight (28) acts of treason. However, included in the charges were other acts which if prove, could be treasonous (The most serious charged concern his advice to the king, "you have an army in Ireland you may employ here to reduce this Kingdom." If "here" meant "England" it was treason; if it meant "Scotland", it was not. Strafford's meaning in that phrase was never determined. Craig Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford TRIAL* 69 CHICAGO L. REV. 2057, 2063.

The prosecution sought an attainder after its prosecution of Strafford began to collapse. *Id.* at 2085-6. Thus, Strafford had not been proven either factually or legally guilty of any crime. Although Strafford might have been guilty under existing law, this was not proved either at trial or during the Parliamentary hearing on his attainder. If Justice Chase meant only to include factual innocence, it is surprising that he did not raise this caveat when citing Strafford.

The attainder subsequently signed by King Charles I, represents yet another example of the evils sought to be eradicated through the *Ex Post Facto* clause. The King's assent was needed to complete the taint and put the subject to death. *Id.* at 2093. Yet prior to his return to England, and wary of Parliamentary machinations against him, the Earl sought and received the

613 (1934). In all crimes where applicable, the defendant has the potential to absolutely defeat a criminal accusation against him. Indeed in California, the procedural mechanisms available to him to assert this substantive right are many and varied.[9]

Yet Petitioner has been divested of the Statute of Limitations applicable to him and any procedural mechanisms that he would have used to defeat prosecution are now powerless. This divestment has occurred despite all notice to the contrary.

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assurances from the King, that "he should not suffer in his person, honour, or fortune." 109 Z. Chafee, THREE HUMAN RIGHTS IN THE CONSTITUTION of 1787 (1956). The Earl, reassured, returned to London only to suffer his fate, bemoaning not the attainder nor treason trial, but the treachery of the sovereign in revoking his promise. Strafford's last words were purportedly: "Put not your trust in Princes." *Id.* at 113. In its full understanding then, the Earl's plight mirrors Petitioner's own: The sovereign itself had promised Petitioner that he would be free from prosecution, his innocence would not be questioned, and he could rely on the word of the sovereign without detriment.

In sum, fundamental fairness requires that an *ex post facto* law not criminalize that which was not criminal before, not retroactively criminalize what it cannot legally prosecute, and that it not revoke its grants of liberty and safety from prosecution and punishment. Thus Strafford stands for legal and not factual innocence. Neither convictions nor acquittals are concerned with factual innocence. Indeed in California, disproving factual innocence is never required to prosecute, convict or punish. It would be a strain of all logic to suppose that because the Clause only deals with factual innocence, California's entire criminal laws are exempt from constitutional provisions dealing exclusively with crime, punishment, and the legal rules of evidence.

The question presented is whether Petitioner's conduct is punishable as a public offense. The answer is no. *People v. Asavis*, 27 Cal.App.2d 685, 687 (1938), *relying on People v. McGee*, 1 Cal.2d 611, 613 (1934); *People v. Crosby*, 58 Cal.2d 713, 722 (1962).

[9] A defendant may object at all stages of proceedings from pleading through trial and may raise it even after conviction.

In 1972, California ruled that reviving a time barred criminal matter violated *ex post facto*. *See Sobiek v. Superior Court*, 28 Cal.App.3d 846 (1972).[10] California was not the first to make such a pronouncement. Historical precedent had also concluded that retroactively abolishing the Statute of Limitations in a criminal matter already barred was unconstitutional. *See Calder v. Bull*, 3 U.S. at 389; *State v. Sneed*, 25 Tex.Supp. 66, 66 (1860); *Moore v. State*, 43 N.J.L. 203, 1881 WL 8329 *6 (1881). These conclusions, early on in this nation's history, show that criminal Statutes of Limitations expressed a finality that the State could not intrude upon.[11]

Laws Respecting Punishment

It violates the *Ex Post Facto* Clause to permit a court to punish for that which is, by law, not liable to any punishment. *See Calder v. Bull*, 3 U.S. 390-91. Here, even where there is a conviction the Statute of Limitations, when raised,[12] rescinds punishment,

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[10] Alternatively, it also ruled that extending a Statute of Limitation was permissible. *See People v. Snipe*, 25 Cal.App.3d 742 (1972).

[11] This rationale is buttressed by another common rule, that criminal Statutes of Limitations are to be strictly construed in favor of the accused. *See Toussie v. United States*, 397 U.S. 112, 114-15 (1970); *People v. Zamora*, 18 Cal.3d 538, 574 (1976). Defendants are meant to benefit from this construction because of the underlying policies, i.e., that the defendant's case will be compromised by the delay in prosecution. These Statutes exist to nullify the district attorney's ability to push the burden onto the defendant to show that he has been prejudiced. It is simply presumed. It is one of the presumptions that underlie criminal Statutes of Limitations. The State is foreclosed from litigating the procedural claim.

[12] The Statute of Limitations may be raised after conviction either on appeal or pursuant to a *habeas corpus* petition. *See People v. Williams*, 21 Cal.4th 335, 341 (1999) (where the charging document indicates on its face that the case is time barred, the issue may be raised at any time); *Ex Parte Vice*, 5 Cal.App. 153 (1907) (pursuant to *habeas corpus* petition).

reverses the conviction and prevents the government from re-indicting.[13]

This Court has emphasized the importance of notice, reliance, and fundamental fairness in its decisions on retroactive punishment. Clearly, this Court's has not limited its analysis to prohibiting laws that retroactively increase the maximum term under the sentencing statute.

Thus in *Lindsey v. Washington*, 301 U.S. at 401-2 fundamental fairness was at the heart of a decision that ruled a retroactive change in a sentence transforming a maximum fifteen (15) year penalty into a minimum mandatory violated *ex post facto* even where the defendant may have received the same sentence under the old statute. The Court stated, "The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." *Lindsey*, at 401.

Forty years later in *Weaver v. Graham*, 450 U.S. 24 (1981), the Court affirmed fair warning and reliance as the mainstays of *ex post facto* jurisprudence. In *Weaver*, the Court held that a State could not retroactively reduce good time credits for a prisoner who had not yet earned them. *Id.* at 25-6. "[A] law need not impair a 'vested right' to violate the *ex post facto*' prohibition." *Id.* at 29.

Notice was again discussed in *Miller v. Florida*,

[13]"A judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law, and one judgment that he is free as matter of substantive law is as good as another" *United States v. Oppenheimer*, 242 U.S. at 85, 87(1916).

482 U.S. 423 (1987). Florida argued that it satisfied all notice concerns by including in the language of the statute that the sentencing guidelines were subject to change. *Id.* at 430-1. Thus, a retroactive change did not violate the *Ex Post Facto* Clause. *Id.* This Court held otherwise, stating that notice required the State to inform the defendant of the precise sentence he was exposed to. *Id.* at 431. Suggesting that a given method for calculating sentences was subject to change did not satisfy the notice requirement. *Id.* Moreover, the change was designed to punish sex offenders more harshly and this change directly targeted a class defendant was a member of. *Id.* at 433-4.

Finally in *Lynce v. Mathis*, 519 U.S. 433, 435-6 (1997) a prisoner was released from prison pursuant to provisional early release credits he earned under a statutory scheme designed to reduce prison overcrowding. The Court took notice of the disadvantage to an individual who has been released from prison and must be subjected to rearrest and re-incarceration following the retroactive cancellation of his time credits. *Id.* at 446-7.

In all, these cases focus their inquiry on notice, reliance, and fundamental justice. It is these very concerns that are at the root of the retroactive removal of a completed bar to prosecution.

The same sort of concerns are implicated by cases involving the retroactive removal of a pardon. For example, in *State v. Keith*, 63 N.C. 140, 1869 WL 1739 *2 (1869), a man was charged with murder for acts committed during the Civil War. Although the State granted immunity for crimes committed in the course of the war, it later repealed its Amnesty Act. *Id.* at * 2. The Supreme Court of North Carolina held that once a pardon had been issued, it could not be revoked: The act revoking amnesty was "substantially an ex post facto

law; it made criminal what, before the ratification of the ordinance was not; and it took away from the prisoner his vested right to immunity." *Id.* at *4.

It violates the Ex Post Facto clause to permit a court to inflict punishment on Petitioner where he was not, by law since 1976, liable to any punishment. *See Calder v. Bull*, 3 U.S. at 390-91.

II. The Purposes of the Ex Post Facto Clause are Implicated by a Retroactive Change in the Statute of Limitations.

California has notified Petitioner and others similarly situated, that it will prosecute child molest cases for a prescribed period of time, and that thereafter it will have no power to state a public offense, let alone prosecute, convict and punish said offense. California has instructed its citizens that they need not defend themselves because the crime is no more. They cannot separate the legal significance of the passage of time from Penal Code section 288. They cannot retroactively create a new offense and cause Petitioner to be subjected to it. To do so is fundamentally unjust and transgresses the *Ex Post Facto* Clause.

For the betterment of all, the government must abide by its own laws. "It is of much greater importance that the rules and interpretations should be certain, consistent, and applied alike to all, than that such particular case should meet with punishment." *Ex Parte Vice*, 5 Cal. App 153, 158-59 (1907); *see also Pendergast v. United States*, 317 U.S. 412, 418 (1943) ("Every statute of limitations, of course, may permit a rogue to escape."); California's arbitrary betrayal of its own laws is precisely what the *Ex Post Facto* Clause was designed

to protect against.[14]

The Statute of Limitations has consistently been treated by the courts as providing such finality[15] and such certainty that once the statute had run, persons have been prohibited from pleading the Fifth Amendment and have been forced to give testimony that would otherwise incriminate themselves. *See Brown v. Walker*, 161 U.S. 591, 597 (1896) (Holding that "if a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compelled to answer."). In these cases, because "the criminality has been removed" the privilege of the Fifth Amendment "ceases to apply" and persons could be compelled to testify. *See Hale v. Henkel*, 201 U.S. 43 (1906).

The Solicitor General contends *Stewart v. Kahn*, 78 U.S. 493 (1878) holds that States may revive criminal actions barred by the Statute of Limitations. They are wrong.[16] In *Kahn*, the federal government passed an act

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[14] The government also argues that the nature of child molestation provides ample support for reviving time barred prosecutions, as the perpetrator is able to conceal his or her crime thus preventing its disclosure or discovery. (Respondent's Brief at 29, 39-40.) The fact that an offender may conceal his crime is not unique to the type of offense, indeed a similar argument was made by the government in relation to conspiracy offenses in the past. As the *Zamora* Court succinctly stated: "[A]nyone who contemplates the commission of a crime realizes that he may be called upon to conceal evidence of his offense. In spite of that almost universal proposition, the Legislature has nevertheless been motivated to set a limitation period for the prosecution of most offenses." *People v. Zamora*, 18 Cal.3d 538, 572 (1976). The American Psycholgical Association, *et. al.*, amici offers little to the debate as their focus tends to support a prospective extension but provides nothing on the issue of retroactivity.

[15] See *Adams v. Woods*, 6 U.S. 336 (1805) (noting that "not even treason can be prosecuted after a lapse of three years").

[16] Properly understood, *Kahn* supports Petitioner's claim that a State may not defy its own laws in violation of the United States

during the civil war suspending the Statute of Limitations where it was not possible by "reason of resistance to the execution of the laws of the United States" to serve process. *Id.* at 494. The Federal act suspended the Statute of Limitations before it ran. *Id.* at. 500-01. In *dicta*, the Court observed that even if a criminal action had run under the law of the conquered state, revival would not have violated the constitution. *Id.* at 503-05. The Court's precedent reflects that hostilities suspend the running of the statute under established precedent and thus never expire during war. Thus State law was ineffectual to cause time to run. Nevertheless the Court was not confronted with the specific instance of revival of a criminal matter, *Kahn* therefore is distinguishable because it is based on precedent specifically applicable in times of war[17] Applying *Kahn*, a war powers case to Petitioner and those similarly situated is untenable.

During the twenty or so years since the Statute of Limitations has run, Petitioner has continued with his life. He is a veteran of the Armed Forces, having served his country during a time of foreign conflict in

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Constitution. It is easy enough to dismiss *Kahn* on the basis of dicta or the failure to analyze the case under either the *Ex Post Facto* or Due Process Clauses, however that is not necessary here. The principles upon which *Kahn* relies lend rather than detract from Petitioner's position for *Kahn* ultimately stands for the proposition that State power must be checked by and is subordinate to the Constitution and when it acts in defiance thereof its acts need not be accorded constitutional protection. *See also*, Hamilton Federalist No. 78 ("No legislative act, contrary to the Constitution, can be valid.")

[17] First, *Kahn* relies on precedent holding that when normal relations between opposing governments are suspended, so too are limitations periods. *Id.* at 503. Second, the Federal government could rely on its War Power and treaty-making power, to impose its law upon its conquered enemy in whatever manner deemed necessary to eradicate any evils of that war, issues not present here. *Id.* at 506-07.

the Korean War. He is now retired from his work. His health is failing and he has suffered a stroke. Other than the pending case, he has no criminal record either before or since these allegations.[18] He should be permitted to rely on the State's own law which protects him from these charges ranging in time from twenty-six (26) to forty-seven (47) years ago. If it does not, then we all suffer, for if California is successful in depriving Petitioner of this right in this situation, then such right has been effectively destroyed for all persons the States may choose to prosecute, no matter how distant in time and memory the conduct may be. No matter how long the State has promised otherwise. No matter how final the rule has been expressed to be.

III. Due Process

Whether or not the Court takes a view of the *Ex Post Facto* Clause that Petitioner's case does not fit within any Calder category, the question remains whether it is fundamentally unfair to deprive Petitioner of a vested right[19] which protected him from

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[18] American Psychological Association et al., argues that this law is necessary because in general, persons convicted of child molestation reoffend. This fact is irrelevant to this case and in essence asks this Court to presume persons accused of molest guilty. Based on this subversion of the presumption of innocence, Amici asks the Court to structure the Penal Code and Constitution around such a premise. Our laws and Constitutions recognize, particularly in criminal matters, that it is a basic logical fallacy to argue that what is true of the group at large must be true of the individual specifically.

[19] The Supreme Court cases cited in Respondent's Due Process section are economic rather than criminal cases and are inapposite even on their own terms. (Respondent Brief 35-6.) All involved adjustment of remedies in an economic arena where the legislation came with presumptions of constitutionality, presumptions not applicable here. *See Ferguson v. Skrupa*, 372 U.S. 726 (1963). None involved the creation or recreation of

retroactive legislation such as 803(g). *Cf. Weaver v. Graham*, 2450 U.S. 24 (holding that ex post facto analysis not dependant on vested rights).

The Court is invited to reexamine the interplay the Statute of Limitations has as a substantive right[20]

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criminal causes of action or implicated personal liberty interests. It is a strain then to reason as does respondent, that the *Chase* and *Danzer* line of cases dealing with the expiration of causes of action resulting from time bars had anything to do with the principles announced in cases concerned solely with readjusting remedies for pre-existing ongoing rights. *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304 (1945); *Danzer & Co. v. Gulf S.I.R., Co.*, 268 U.S. 633 (1925). To assume further that *Usery et al.*, intended to overrule these principles while never addressing them and relying on other principles and precedent that dated from the same era as *Danzer* and *Chase*. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). *Usery et. al.*, never even name *Chase* and *Danzer*, to distinguish, overrule or analogize.

Even if the *Usery* doctrine stood for the broader proposition that creating new causes of action, even retrospectively, is an appropriate legislative measure in the economic field is still a far cry and implicates different assessments when one considers that the courts and legislatures are engaged in "settling expectations" amongst private litigants. Creating retrospective criminal causes of action against the citizenry implies and involves principles of different scope and magnitude and certainly do not come to the table with presumptions of constitutionality. Finally, the question may perhaps remain whether or not in the economic realm the destruction of a cause of action simultaneously vests in one party or another any rights in relationship thereto. However, in this criminal case, a long line of cases, California and other jurisdictions, have held precisely that in the criminal field the expiration of a Statute of Limitations indeed vests a substantive right. The cause of action having been destroyed and the right vested, liberty as opposed to economic expectations are implicated and must be vindicated under established principles of due process.

[20] *Guaranty v. York* held that State Statutes of Limitations were substantive rather than merely procedural and therefore warranted their use in federal diversity cases. In so doing it stated, a "statute that would completely bar recovery in a suit if

replacing and mirroring Constitutional Amendments in its scope. For it is clear that merely providing trial related procedures while divesting Petitioner of this right does not resolve the harm or the due process issue. "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three." *Poe v. Ullman*, 367 U.S. 497, 541(1961)(Harlan J., dissenting).

CONCLUSION

That Statutes of Limitations were contemplated early on in American history is clear from *Calder v. Bull*. That they posed a potential *ex post facto* problem is of more importance. See *Calder v. Bull*, 3 U.S. at 290-91, *Moore v. State* 43 N.J.L. 203, 1881 WL 8329 *6 (1881); *Falter v. United States*, 23 F.2d 420, 425 (1928). *Calder* dealt with Statutes of Limitations in the following manner:

> But I do not consider any law *ex post facto*, within the prohibition, that *mollies the rigor of the criminal law*, but only those that create, or aggravate, the crime; or encrease the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations; or to excuse acts which were unlawful, and before

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brought in a State court bears on a State created right vitally and not merely formally or negligibly." *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945).

committed, and the like; is retrospective. *Calder v. Bull*, 3 U.S. at 391 (emphasis added).

Clearly mollifying the rigors of criminal law sets the tone for interpreting the phrase to "save time from the Statute of Limitations." In this context, the retroactive effect is intended to benefit the defendant and not the government. It is a stretch to import any other meaning therein.

For all the aforementioned reasons, relief should be granted and the prosecution dismissed.

Dated this 20th day of March, 2003

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In the Supreme Court of the United States

MARIO REYNOLDS STOGNER, PETITIONER

v.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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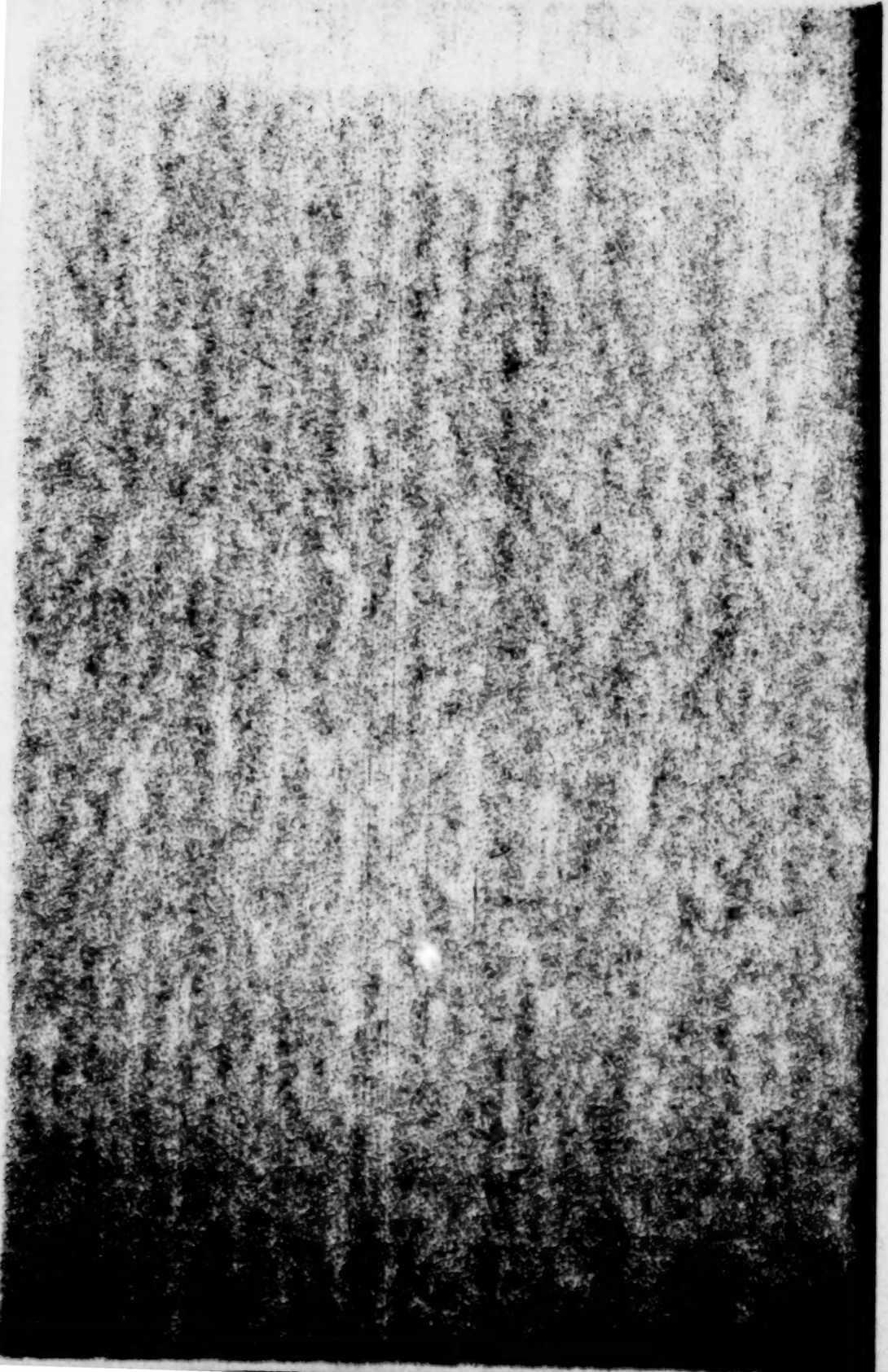

QUESTIONS PRESENTED

1. Whether a law that permits the government to prosecute an offense for which the statute of limitations had expired before the law's enactment violates the Ex Post Facto Clause.

2. Whether such a statute violates the Due Process Clause.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case involves the constitutionality, under the Ex Post Facto Clause and the Due Process Clause, of a law that permits the prosecution of an offense for which the statute of limitations had previously expired. The United States has a substantial interest in the resolution of those questions.

Congress has recently enacted legislation that eliminates any statute of limitations for terrorism offenses that result in, or create a foreseeable risk of, death or serious bodily injury. See Pub. L. No. 107-56, Tit. VIII, § 809(a), 115 Stat. 379 (18 U.S.C. 3286(b)). That new legislation permits the commencement of terrorism prosecutions that were time-

barred before the statute's enactment. § 809(b), 115 Stat. 380. The Attorney General has also forwarded to Congress proposed legislation to eliminate the statute of limitations for child abduction and felony sexual offenses and to toll statutes of limitations in any felony case in which the perpetrator is identified through DNA evidence. In both cases, the proposals would apply retroactively to offenses for which a prosecution was time-barred before the statute's enactment. The proposal with respect to child abduction and felony sexual offenses has been passed by the House of Representatives, see H.R. 5422, 107th Cong., 2d Sess. § 202 (2002), and a bill embodying both proposals has been introduced in the current Congress, see S. 149, 108th Cong., 1st Sess. § 8 and § 9 (2003). See also Letter from Daniel J. Bryant Asst. Att'y Gen., U.S. Dep't of Justice, to Honorable Joseph R. Biden, Jr., U.S. Senator 7-10 (Nov. 25, 2002) (regarding S. 2513, 107th Cong., 2d Sess. (2002), and discussing both proposals). Because federal legislation is subject to ex post facto and due process limits that parallel the limits on state legislation, the decision in this case could affect the constitutionality of a recent Act of Congress and constrict Congress's authority to enact similar legislation.

STATEMENT

1. In 1984, the California legislature revised its laws governing the time within which a criminal prosecution may be commenced. The 1984 law creates three categories of offenses. First, there is no limitations period for certain serious offenses, such as murder. Cal. Penal Code § 799 (West 1985 & Supp. 2003). Second, for most other serious offenses, a prosecution must be commenced within six years after commission of the offense. *Id.* § 800. Third, for all other offenses, a prosecution must be commenced within three years after commission of the offense. *Id.* § 801. The 1984 law

permits extensions and tolling of the limitations periods in certain circumstances. *Id.* § 803.

In response to increasing evidence that young victims of sex offenses often do not report those offenses in sufficient time to permit prosecution within the limitations period, the California legislature amended the 1984 law. The amendment provides that, effective January 1, 1994, a prosecution for certain sex offenses against persons under the age of 18 may be commenced notwithstanding the expiration of the limitations period if the action is filed within one year of the date of a victim's report to a law enforcement agency, the crime involves substantial sexual conduct, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. Cal. Penal Code § 803(g)(1) and (2)(B) (Supp. 2003). After several California Courts of Appeal held that the amendment did not apply when the otherwise applicable statute of limitations had expired before the amendment's effective date, the California legislature further amended the law. The new amendment provides that Section 803(g) applies to a cause of action arising "before, on, or after, January 1994," and that it operates to "revive any cause of action barred by Section 800 or 801." *Id.* § 803(g)(3)(A) and (B)(i) & Section 803 Law Revision Comm'n Cmt. (Supp. 2003).

In *People* v. *Frazer*, 88 Cal. Rptr. 2d 312, 321-322 (1999), cert. denied, 529 U.S. 1108 (2000), the California Supreme Court held that a prosecution commenced in accordance with the preconditions of Section 803(g) is timely even when the otherwise applicable limitations period expired before January 1, 1994. The *Frazer* court further held that, as so applied, Section 803(g) violates neither the prohibition against ex post facto laws nor due process of law.

Drawing on *Collins* v. *Youngblood*, 497 U.S. 37 (1990), the *Frazer* court held that a statute violates the prohibition against ex post facto laws when it retroactively alters the

definition of any crime or increases the punishment for any criminal act. 88 Cal. Rptr. 2d at 325. The court concluded that statutes of limitations that apply retroactively to revive limitation periods that have expired do not transgress those limits. The court explained that statutes of limitations operate "to insulate from prosecution even those individuals whose conduct otherwise satisfie[s] all elements of a penal statute, and who [are] otherwise subject to criminal punishment, at the time the conduct occurred." *Id.* at 327.

The *Frazer* court rejected the contention that Section 803(g) violates the prohibition against ex post facto laws because it removes a defense that would otherwise defeat a prosecution. 88 Cal. Rptr. 2d at 328. The *Frazer* court reasoned that "ex post facto protection extends only to 'defense[s]' bearing on the 'definition' and 'elements' of proscribed *conduct*, or involving 'excuse or justification' for its *commission*." *Ibid.* (quoting *Collins*, 497 U.S. at 50). Section 803(g) does not exceed those limits, the *Frazer* court explained, because it merely "regulates the time at which child sexual abuse *defined and punished elsewhere in the Penal Code* may be charged." *Ibid.*

The *Frazer* court also rejected the contention that Section 803(g) violates due process. The court noted that in *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945), this Court held that civil statutes of limitation may be modified retroactively without violating the Due Process Clause. *Frazer*, 88 Cal. Rptr. 2d at 333-334. The *Frazer* court saw "no meaningful basis" for distinguishing criminal statutes of limitation. *Id.* at 335.

2. On April 17, 1998, a criminal complaint was filed against petitioner charging him with two counts of committing a lewd or lascivious act on a child under the age of 14, in violation of California Penal Code § 288(a) (West 1992). J.A. 1-4. The first count alleged that petitioner engaged in lewd conduct on Jane Doe I between January 1, 1955, and September 30, 1964. J.A. 1. The second count alleged that petitioner engaged in lewd conduct on Jane Doe II between January 1, 1967, and September 27, 1973. J.A. 2-3. The complaint further alleged that the counts could be prosecuted under Section 803(g) because the victims were under the age of 18 when the crimes occurred, the complaints had been filed within one year of the date when the victims reported the offenses to a law enforcement agency, the crime involved substantial sexual conduct, and independent evidence clearly and convincingly corroborated the victim's allegations. *Ibid.*

Petitioner demurred to the complaint on the ground that Section 803(g) violates the constitutional prohibition against ex post facto laws. J.A. 6. The Superior Court granted the demurrer and denied a motion to reinstate the complaint. *Ibid.* The Court of Appeal reversed. J.A. 5-8. It held that in *Frazer*, "[o]ur Supreme Court has rejected the argument that section 803(g) constitutes an impermissible ex post facto law." J.A. 6. This Court denied a petition for a writ of certiorari. *Stogner* v. *Califonia*, cert. denied, No. 99-8895 (Oct. 2, 2000). J.A. 9.

A grand jury then issued an indictment charging petitioner with the same crimes as had been alleged in the complaint. J.A. 10-13. Petitioner demurred to the indictment on ex post facto and due process grounds, but the trial court overruled the demurrer. J.A. 14, 34. Relying on *Frazier*, the Court of Appeal affirmed, J.A. 33, and the California Supreme Court denied review. J.A. 37.

SUMMARY OF ARGUMENT

I. This Court has held that the prohibition against ex post facto laws encompasses only the four specific categories of criminal laws identified by Justice Chase in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 385, 390 (1798). A law that permits the prosecution of an offense for which the statute of limitations

had previously expired does not fall within any of those categories.

The first *Calder* category reaches laws that criminalize conduct that was innocent at the time the crime was committed. The statute at issue here does not have that effect. Instead, it removes a barrier to the prosecution of conduct that was criminal when the defendant engaged in it. There is no sound basis for expanding *Calder*'s first category to reach laws that change the legal effect of later acts that have removed the government's ability to prosecute conduct that was criminal when done. Justice Chase's formulation—that the conduct must have been "innocent when done" (*Calder*, 3 U.S. (3 Dall.) at 390)—is supported by all the available historical evidence. It accords with one of the core purposes of the prohibition against ex post facto laws: to assure that statutes give fair warning of their effect, so that persons can conform their conduct to the law. And, over the past 200 years, this Court has repeatedly reaffirmed that test.

The second and third *Calder* categories prohibit laws that either introduce a new punishment or increase the severity of the punishment. A law that permits prosecution of crimes for which the statute of limitations had previously expired does neither of those things. Instead, its permits the prosecutor to seek the same punishment that the law authorized at the time the offense was committed.

Finally, *Calder*'s fourth category covers laws that alter the rules of evidence so as to reduce the amount of evidence required to convict. Laws that permit the prosecution of crimes for which the statute of limitations had previously expired are not rules of evidence. Equally important, such statutes do not have any effect on the government's burden to establish the elements of the crime.

II. There is also no merit to petitioner's due process claims. Under this Court's decisions, if a constitutional claim is covered by a specific constitutional provision, that claim

must be analyzed under the standard drawn from that provision, not under the Due Process Clause. Accordingly, the Constitution's explicit textual restraint on a legislature's enactment of ex post facto laws, rather than generalized notions of due process, supplies the standard for evaluating whether a retroactive criminal statute is constitutional.

Even if a separate due process analysis were warranted, a statute that permits the prosecution of crimes for which the statute of limitations had previously expired does not implicate any right that is fundamental for due process purposes. In *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945), the Court unanimously held that the shelter provided by the expiration of a limitations period has never been regarded as a fundamental right. The Court applied that rule to a civil case, but for purposes of the Due Process Clause, there is no persuasive distinction between a criminal and civil statute of limitations.

Because a statute that revives an expired limitations period does not interfere with a fundamental right, the sole question under the Due Process Clause is whether it is justified by a rational legislative purpose. Based on the increasing evidence that minors who are victims of sexual offenses often fail to report them in time to permit timely prosecution, it was entirely rational for California to apply its new limitations period retroactively.

ARGUMENT

I. A LAW THAT PERMITS THE PROSECUTION OF AN OFFENSE FOR WHICH THE STATUTE OF LIMITATIONS HAD PREVIOUSLY EXPIRED DOES NOT VIOLATE THE EX POST FACTO CLAUSE

Article I, Section 10 of the Constitution provides that "[n]o State shall * * * pass any * * * ex post facto Law." Article I Section 9, places the same restraint on Congress.

In *Calder* v. *Bull*, 3 U.S. (3 Dall.) 385, 389-390 (1798), Justice Chase concluded that the Constitution's prohibition against ex post facto laws reaches four specific categories of criminal statutes:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

This Court has repeatedly approved that formulation as an accurate statement of the scope of the prohibition against ex post facto laws. See *Carmell* v. *Texas*, 529 U.S. 513, 525 (2000) (citing cases). Because a law that permits the prosecution of an offense for which the statute of limitations had previously expired does not fall within any of the *Calder* categories, such a law does not violate the Ex Post Facto Clause.

A. A Law That Permits The Prosecution Of An Offense For Which The Statute Of Limitations Had Previously Expired Does Not Criminalize Conduct That Was Innocent When Done And Therefore Does Not Fall Within Calder's First Category

1. A law that permits the prosecution of an offense for which the statute of limitations had previously expired does not fall within *Calder*'s first category because it does not criminalize conduct that was "innocent when done." *Calder*, 3 U.S. (3 Dall.) at 390 (Chase, J.). Instead, by retroactively

modifying the statute of limitations for an offense, it permits prosecution of conduct *that was criminal when done*.

This case illustrates that fundamental point. The indictment alleges that, between 1955 and 1973, petitioner committed lewd and lascivious conduct against two minors under the age of 14. J.A. 10-13. If those allegations are true, petitioner engaged in conduct that was criminal when done. Indeed, California has prohibited such lewd and lascivious acts since 1901, and the elements of that offense have been established for decades. *People* v. *Frazer*, 88 Cal. Rptr. 2d 312, 327 (1999), cert. denied, 529 U.S. 1108 (2000). Because California had a three-year statute of limitations for lewd or lascivious conduct when petitioner's alleged crime occurred, any attempt to prosecute petitioner for his alleged conduct would have been barred after 1976 absent the enactment of California's new limitations period. J.A. 21-22. But that simply means that the new limitations period eliminates a barrier to the prosecution of conduct that was criminal when done; it does not make criminal what was innocent when done.

The limitation in *Calder*'s first category to statutes that penalize actions that were innocent when done accords with one of the core purposes of the prohibition against ex post facto laws—"to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981); see *Dobbert* v. *Florida*, 432 U.S. 282, 298 (1977). Statutes that penalize conduct that was innocent when done violate that fair warning principle. *Rogers* v. *Tennessee*, 532 U.S. 451, 459 (2001). Statutes that revive the government's authority to prosecute conduct that was criminal, when done, do not.

In this case, for example, if California had criminalized lewd and lascivious acts against minors under the age of 14 for the first time after petitioner's alleged conduct occurred,

petitioner would not have received fair warning that his alleged conduct was criminal. In fact, however, California has prohibited such conduct since 1901, and petitioner therefore received fair warning that such conduct was prohibited. Petitioner cannot reasonably assert that he engaged in such conduct in reliance on a statute of limitations.

2. Petitioner argues (Br. 10-12) that *Calder*'s first category is not limited to statutes that criminalize actions that were innocent when done, but also includes statutes that change the legal significance of "secondary acts" that occur after the criminal conduct has occurred and divest a criminal act of its criminal quality. Petitioner identifies the expiration of a limitations period as such a secondary act.

In its express language, however, *Calder*'s first category encompasses only statutes that criminalize actions that were "innocent when done." 3 U.S. (3 Dall.) at 390. That limitation accords with the understanding of early commentators and scholars. Blackstone stated that a law is ex post facto "when after an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts punishment on the person who has committed it." 1 William Blackstone, *Commentaries on the Laws of England* 46 (1765). Wooddeson described what would become *Calder*'s first category as laws that "respect the crime, determining those things to be treason, which by no prior law or adjudication could be or had been so declared." 2 R. Wooddeson, *A Systematical View of the Laws of England* 631 (1792). Story described the first category as laws "whereby an act is declared a crime, and made punishable as such, when it was not a crime, when done." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1339, at 212 (1833). And Kent similarly described the first category as including every law "that made an act done before the passing of the law, and which was innocent when done, criminal." 1 James

Kent, *Commentaries on American Law* 408 (3d ed. 1836) (Lecture 19).

The Founding-era state constitutions expressed their ex post facto prohibitions with similar language. See *Carmell*, 529 U.S. at 535 n.25. Massachusetts prohibited "[l]aws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws." *Ibid.* Likewise, North Carolina and Maryland prohibited "retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal." *Ibid.*

This Court has also repeatedly described *Calder*'s first category as confined to statutes that penalize acts that were innocent when done. In *Beazell* v. *Ohio*, 269 U.S. 167, 169-170 (1925) (emphasis added), the Court stated that "[i]t is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, *which was innocent when done* * * * is prohibited as *ex post facto*." Numerous other decisions describe *Calder*'s first category in the same way.[1] Petitioner offers no reason for the Court to

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[1] *E.g.*, *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325-326 (1866) ("By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed."); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866) (A law is ex post facto when it imposes a punishment for acts "which were not punishable at the time they were committed."); *Gut* v. *Minnesota*, 76 U.S. (9 Wall.) 35, 38 (1869) (ex post facto law "imposes a punishment for an act which was not punishable at the time it was committed"); *Duncan* v. *Missouri*, 152 U.S. 377, 382 (1894) (ex post facto law "imposes a punishment for an act which was not punishable at the time it was committed"); *Hopt* v. *Utah*, 110 U.S. 574, 589 (1884) (law did not "attach criminality to any act previously done, and which was innocent when done"); *Thompson* v. *Missouri*, 171 U.S. 380, 387 (1898) (law did not "make any act involved in [defendant's] offense criminal that was not criminal at the time he committed the murder of which he was found guilty"); *Mallett* v. *North Carolina*, 181 U.S. 589, 597 (1901)

depart from that established understanding of *Calder*'s first category.

3. Petitioner also contends (Br. 14-15) that California's new limitations period violates *Calder*'s first category because the statute of limitations is a material ingredient of an offense in California, and this Court stated in *Miller* v. *Florida*, 482 U.S. 423, 433 (1987) (quoting *Hopt* v. *Utah*, 110 U.S. 574, 590 (1884)), that a law is ex post facto when it "change[s] the ingredients of the offence." That contention is based on a misunderstanding of California law and *Calder*'s first category.

As the California Supreme Court has explained, California's limitations period is not an element of the crime itself. *Frazer*, 88 Cal. Rptr. 2d at 328-329 n.22. Instead, it operates "to insulate from prosecution even those individuals whose conduct otherwise satisfie[s] all elements of a penal statute, and who [are] otherwise subject to criminal punishment, at the time the conduct occurred." *Id.* at 327. The status of the limitations period under California law is reflected in the burden of proof on that issue. Under California law, "guilt" must be established beyond a reasonable doubt, while other issues in a criminal case are resolved under a preponderance of the evidence standard. *People* v. *McGill*, 51 P.2d 433, 435 (Cal. Dist. Ct. App. 1935). Because the limitations period is not an element of the defendant's "guilt" under California law, that issue is resolved under a preponderance standard. *Ibid.* See *People* v. *Zamora*, 134 Cal. Rptr. 2d 784, 802 n.27 (1976). The California Supreme Court has held that, while a timely filed charge is not an element of the crime itself, it is

(law in question "did not make that a criminal act which was innocent when done"); *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990) ("The *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause."); *id.* at 52 ("The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done.").

"is an essential element in the final power to pronounce judgment." *People* v. *Crosby*, 25 Cal. Rtpr. 847, 853 (1962). But that does not mean that a change in the limitations period alters the elements of the offense.

Regardless of the status of a limitations period under California law, a violation of category one occurs, as discussed above, only when a statute penalizes conduct that was innocent when the defendant engaged in the conduct. It follows that a law impermissibly changes "the ingredients of an offense" within the meaning of *Calder*'s first category only when it changes the elements of the crime itself. As the Court explained in *Collins*, 497 U.S. at 43, under *Calder*'s first category, "[l]egislatures may not retroactively alter the definition of crimes." Only changes in the elements of the crime itself can have the prohibited effect of criminalizing conduct that was innocent when done. And only changes in the elements of the crime itself can violate the fair warning principle that animates *Calder*'s first category. Changes in what the prosecution must prove with respect to matters other than the elements of the crime, such as the applicable limitations period or the appropriate venue, neither penalize conduct that was innocent when done nor deprive a defendant of fair warning. See *Gut* v. *Minnesota*, 76 U.S. (9 Wall.) 35, 37-38 (1869) (retroactive change in venue does not violate Ex Post Facto Clause). They therefore fall outside *Calder*'s first category.

4. Amici National Association of Criminal Defense Lawyers, *et al.* contend (Br. 11) that *Calder*'s first category, "[p]roperly understood," prevents the government from retroactively eliminating the need to prove any fact when that action is "tantamount to eliminating an element of the offense." The limitations period is tantamount to an offense element, Amici argue, because it must be proved to obtain a conviction. The limitations period, however, is not "tantamount" to an element of the offense within the meaning of

Calder's first category. An elimination of one of the elements of the offense penalizes conduct that was innocent when done; a change in the limitations period does not.

Amici seek support for their theory (Br. 11) in Justice Chase's statement that category one extends to laws that "inflicted punishments, where the party was not, by law, liable to any punishment." *Ibid.* (quoting *Calder*, 3 U.S. (3 Dall.) at 389). In the context of the opinion as a whole, that statement must be understood to refer to laws that inflicted punishments, where the party was not, by law, liable to any punishment *when the alleged criminal conduct occurred.* Indeed, immediately following the statement cited by Amici, Justice Chase gave as an example of the kind of law to which he was referring the case of the Earl of Strafford. *Calder*, 3 U.S. (3 Dall.) at 389 n. (a). As explained by Wooddeson, in that case, Parliament punished as treason conduct that was innocent when done. 2 Wooddeson, *supra*, at 629-631. Moreover, on the very next page of the opinion, Justice Chase described the first category as including only laws that penalize conduct that was innocent when done. *Calder*, 3 U.S. (3 Dall.) at 390.

Amici also attempt to draw support for their theory from Justice Chase's reference to laws that "save time from the statute of limitations." Br. 12 (citing *Calder*, 3 U.S. (3 Dall.) at 391). In Amici's view, that reference shows that Justice Chase viewed laws that shorten the limitations period as outside the Ex Post Facto Clause because they are ameliorative. By implication, they argue, Justice Chase necessarily viewed laws that extend the limitations period as a violation of the Ex Post Facto Clause.

Amici misread Justice Chase's reference to laws that save time from the limitations period. The relevant passage is as follows:

> Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations; or to excuse acts which were unlawful and before committed, and the like; is retrospective. But such laws may be proper or necessary, as the case may be.

Calder, 3 U.S. (3 Dall.) at 391. In that passage, laws that save time from the statute of limitations most likely refers to laws that retroactively *extend* the limitations period, not laws that shorten it. See *Davis* v. *Ballard*, 24 Ky. (1 J.J. Marsh.) 563, 579 (1829) (interpreting the passage in that way); *Davis* v. *Minor*, 2 Miss. (1 Howard) 183, 191-193 (1835) (same); see also *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493, 503-505 (1870) (characterizing laws reviving time-barred actions as deducting time from that provided by statute of limitations); *Blacks's Law Dictionary* 1063 (1st ed. 1891) ("save" defined in part to mean "[t]o toll, or suspend the running or operation of; as to 'save' the statute of limitations"). By stating that such laws "may be proper or necessary, as the *case may be*" *(Calder*, 3 U.S. (3 Dall.) at 391), Justice Chase was suggesting, if not stating directly, that such laws, while retrospective, are outside the scope of the ex post facto prohibition. *Davis* v. *Ballard*, 24 Ky. (1 J.J. Marsh.) at 579. At best, Justice Chase's reference to laws that save time from a statute of limitations is somewhat cryptic. What is clear is that Justice Chase did not say that a law that revived an expired limitations period would violate the ex post facto prohibition, and any such statement would have been inconsistent with his definition of ex post facto laws.

Noting that Justice Chase relied on Wooddeson in creating his four categories, Amici also seek to draw support for

their theory from Wooddeson. Specifically, they rely on Wooddeson's description of acts of Parliament that inflicted the pains of attainder on those who had levied war against the King, and had fled from justice, provided they did not surrender by a certain future date. Br. 12-13 (citing 2 Wooddeson, *supra*, at 625-626). Amici assert that Wooddeson's treatment of the surrender date as an innovation in the offense shows that category one is not limited to changes in the elements of the crime.

The example cited by Amici, however, was not an ex post facto law. The addition of a surrender date was an ameliorative change in the prohibition against treason. Moreover, because the surrender date was a future one, the change was prospective rather than retroactive. Consistent with that understanding, Wooddeson did not describe the example as an ex post facto law. And while Justice Chase recited *all* of Wooddeson's other examples of bills of attainder as examples of ex post facto laws (*Carmell*, 529 U.S. at 522-524), he did not use that one. In any event, in the example cited by Amici, the failure to surrender *was* an element of the crime. As Wooddeson described it, the failure to surrender "consummated" a "new treason." 2 Wooddeson, *supra*, at 625-626. That example therefore cannot show that category one includes something other than changes in the elements of the crime.

5. While petitioner and his Amici purport to find support for their theories in *Calder*'s first category, in reality, they seek to create an entirely new category of ex post facto laws. Indeed, Amici admit as much, stating that *Calder*'s categories are merely "illustrative." Br. 11. But in *Collins*, the Court emphatically rejected the contention that the Ex Post Facto Clause extends beyond *Calder*'s four categories, explaining that "the prohibition which may not be evaded is the one defined by the *Calder* categories." 497 U.S. at 46. In

Carmell, the Court reaffirmed that "it [is] a mistake to stray *beyond Calder*'s four categories." 529 U.S. at 539.

B. A Law That Permits The Prosecution Of An Offense For Which the Statute Of Limitations Had Previously Expired Does Not Remove A Defense Within The Meaning Of Calder's First Category

There is also no merit to petitioner's contention (Br. 20-25) that the State's new limitations period for sexual offenses violates *Calder*'s first category because it eliminates a defense to prosecution. Under *Collins*, the elimination of a defense can violate *Calder*'s first category only when the defense is "related to the definition of the crime," or to "the matters which might be pleaded as an excuse or justification for the conduct" that has been charged as a crime. 497 U.S. at 50. *Collins*'s formulation harmonizes the Court's previous statements that alterations in a defense can violate the Ex Post Facto Clause, see *Beazell* v. *Ohio*, 269 U.S. 167, 170 (1925), with the established understanding that *Calder*'s first category encompasses only changes that penalize conduct that was innocent when done.

The Court's approval of *United States* v. *Hall*, 26 F. Cas. 84 (C.C. D.Pa. 1809) (No. 15,285), and its overruling of *Kring* v. *Missouri*, 107 U.S. 221 (1883), illustrates the distinction between defenses that implicate the prohibition against ex post facto laws and those that do not. In *Hall*, the United States charged a vessel owner with failure to deliver cargo. The owner pleaded as a defense that a severe storm had disabled the vessel at sea, forcing him to land in Puerto Rico, where the government forced him to sell the cargo. 26 F. Cas. at 84. Justice Washington stated that at the time of the owner's conduct, an unavoidable accident was an affirmative defence to a charge of failure to deliver cargo. He further stated that, if applied in the vessel owner's case, a change in the defense requiring proof that the cargo was lost at sea

would be an invalid ex post facto law. *Id.* at 86. In *Collins*, the Court stated that Justice Washington had reached the correct conclusion. The Court explained that "[a] law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done." 497 U.S. at 49.

In *Kring*, the defendant pleaded guilty to second degree murder and obtained a reversal of his conviction on appeal. On remand, Kring was convicted of first degree murder and sentenced to death. 107 U.S. at 222. At the time of Kring's criminal conduct, a plea of guilty to second degree murder constituted an acquittal of first degree murder even if the defendant successfully challenged his conviction for second degree murder on appeal. By the time Kring pleaded guilty to second degree murder, however, the law had changed, and the plea did not constitute an acquittal to first degree murder if the defendant subsequently obtained a reversal of his conviction for second degree murder on appeal. In *Kring*, the Court held that the change impermissibly deprived the defendant of a defense he had possessed to first degree murder at the time he engaged in his criminal conduct. *Id.* at 228-229. In *Collins*, the Court overruled *Kring*, explaining that "Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge." 497 U.S. at 50.

Under *Collins*, as illuminated by its approval of *Hall* and disapproval of *Kring*, a statute of limitations defense is not the kind of defense that implicates the prohibition against ex post facto laws. Like the defense at issue in *Kring*, a statute of limitations defense does not relate to an element of the crime itself; it does not operate as an excuse or justification for alleged criminal conduct; and it does not show that the charged conduct was innocent when done.

C. A Law That Permits The Prosecution Of An Offense For Which The Statute Of Limitations Had Previously Expired Does Not Violate Any Of The Other Calder Categories

1. A law that permits the prosecution of an offense for which the statute of limitations has expired also does not fall within either category two or three. Such a law does not "aggravate[] a crime, or make[] it greater than it was, when committed," and it does not "change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed." *Calder*, 3 U.S. (3 Dall.) at 390. As the Court explained in *Carmell*, categories two and three apply only to statutes that affect punishment. 529 U.S. at 524. Category two encompasses statutes that create a new form of punishment, while category three encompasses statutes that increase the severity of the punishment. *Id.* at 523 & n.12. A law that permits the prosecution of an offense for which the statute of limitations had previously expired does neither of those things. Instead, it permits the prosecutor to seek the same forms and amount of punishment that the law authorized at the time the offense was committed.

Petitioner contends (Br. 26-27) that California's law violates category two because it increases the limitations period, the class of persons subject to prosecution, and the jurisdiction of the courts. None of those asserted effects, however, introduces any new form of punishment. They therefore provide no basis for a finding that California's law violates category two.

Petitioner similarly errs in contending (Br. 29-30) that the new limitations period violates category three because he was subject to *no* punishment before the statute was enacted, while he is subject to at least some punishment now. As stated by Justice Chase, the third category is triggered only when a statute imposes more punishment "than the law annexed to the crime, *when committed*." *Calder*, 3 U.S. (3

Dall.) at 390 (emphasis added). Consistent with Justice Chase's formulation, the Court has repeatedly held that the amount of punishment raises ex post facto concerns only when it is increased "beyond what was prescribed *when the crime was consummated.*" *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (emphasis added).[2]

2. A law that permits the prosecution of an offense for which the statute of limitations had previously expired also does not "alter[] the legal rules of evidence, and receive[] less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *Calder*, 3 U.S. (3 Dall.) at 390. In *Carmell*, the Court explained that *Calder*'s fourth category encompasses rules of evidence that reduce either "the burden of proof" or "the quantum of evidence required to convict an offender," and thereby "subvert[] the presumption of innocence." 529 U.S. at 532.

The Court has invalidated two laws as category four violations—a law that retroactively required a class of persons to prove that they did not commit an offense, *Cummings*, 71 U.S. (4 Wall.) at 327-328, and a statute that retroactively eliminated the rule that the testimony of the victim of a sexual offense is insufficient by itself to prove that crime.

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[2] *Garner* v. *Jones*, 529 U.S. 244, 249-250 (2000) ("One function of the Ex Post Facto Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission."); *Lynce* v. *Mathis*, 519 U.S. 433, 441 (1997) ("The bulk of our *ex post facto* jurisprudence has involved claims that a law has inflicted 'a greater punishment, than the law annexed to the crime, when committed.'"); *Weaver* v. *Graham*, 450 U.S. 24, 28 (1981) ("The *ex post facto* prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'"); *Beazell*, 269 U.S. at 169 (A law violates the Ex Post Facto Clause when it "makes more burdensome the punishment for a crime, after its commission.").

Carmell, 529 U.S. at 530. The Court has also described as a category four violation a law that retroactively eliminated the requirement that the testimony of two witnesses was necessary to obtain a conviction for treason *Id.* at 526. In contrast, the Court has held that category four did not bar retroactive application of a law permitting felons to testify, *Hopt* v. *Utah*, 110 U.S. 574, 589-590 (1884), or a law allowing the introduction into evidence of expert handwriting testimony, *Thompson* v. *Missouri*, 171 U.S. 380 (1898).

Under those decisions, a law that does nothing more than permit the prosecution of an offense for which the statute of limitations had previously expired does not fall within category four. Indeed, such a law is not a "rule[] of evidence" at all. *Calder*, 3 U.S. (3 Dall.) at 390. Instead, it addresses the time within which it is permissible to commence a prosecution. The forms of evidence that may be introduced to prove that a prosecution has been timely commenced and the standard for measuring whether such evidence is sufficient are left to prior law.

Statutes that do nothing more than establish a new limitations period also do not implicate category four because they do not relate to the evidence that is necessary to establish the elements of the crime itself. Only evidentiary rules that reduce the burden of proving the crime itself "subvert[] the presumption of innocence." *Carmell*, 529 U.S. at 532. Just as category one violations are limited to changes in the definition of the crime itself, category four violations are limited to evidentiary rules that reduce the burden of establishing those elements. Both prohibitions work together to ensure that a statute does not penalize conduct that was innocent when done. *Ibid.* (explaining the interrelationship between changes in the elements of the offense and reducing the quantum of evidence necessary to convict).

In one respect, California's new law does more than establish a new limitations period. It conditions application of

the new period on proof that the crime involved substantial sexual conduct, and independent evidence that clearly and convincingly corroborates the victim's allegations. Because that component of California's law actually *increases* the quantum of evidence that the government must establish, and because such proof is a precondition to application of the new limitations period, rather than an element of the crime itself, it does not implicate category four.

D. Additional Precedent Supports The Constitutionality Of Laws That Permit The Prosecution Of Offenses For Which The Statute Of Limitations Had Previously Expired

1. *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870), further supports the conclusion that a law that permits prosecution of an offense for which the statute of limitations had previously expired does not violate the prohibition against ex post facto laws. *Stewart* involved a challenge to federal legislation that tolled the statute of limitations applicable in both civil and criminal cases for the period during which exigencies of the Civil War prevented service of process. The Court rejected the claim that the law exceeded Congress's power as applied to state law actions in state courts. Before doing so, however, the Court first concluded that the statute's tolling provision applied retroactively in both civil and criminal cases even "where the action was barred at the time of its passage," and that "[t]here is no prohibition in the Constitution against retrospective legislation of this character." *Id.* at 504.

Stewart involved a civil suit, so its conclusion with respect to criminal cases is dicta. But the Court's statement that there is no constitutional barrier to a law that permits the prosecution of an offense for which the statute of limitations had previously expired suggests that the conclusion was not viewed as controversial at the time.

2. The courts of appeals have also uniformly rejected ex post facto challenges to federal legislation extending the limitation period for crimes committed before their enactment where a prosecution was not already time-barred.[3] One of the early decisions explained that such a statute does not violate the prohibition against ex post facto laws because it does not "render a previously innocent act criminal," "aggravate or increase the punishment for the crime[]," or "alter the rules of evidence." *Clements* v. *United States*, 266 F.2d 397, 399 (9th Cir.), cert. denied, 359 U.S. 985 (1959). A more recent decision similarly explained that such a statute does not "criminalize[] previously innocent conduct," "enhance[] the punishment for an existing crime," or eliminate a defense "related to the definition of the crime, or to the matters which a defendant might plead as justification or excuse." *United States* v. *Brechtel*, 997 F.2d 1108, 1113 (5th Cir. 1993). The analysis in those decisions is equally applicable to statutes that permit the prosecution of offenses for which the statute of limitations had previously expired.

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[3] *United States* v. *De La Mata*, 266 F.3d 1275 (11th Cir. 2001) (increasing limitations period from five to seven years for financial institution offenses); *United States* v. *Grimes*, 142 F.3d 1342 (11th Cir. 1998) (increasing limitations period from five to seven years for crimes involving explosives), cert. denied, 525 U.S. 1088 (1999); *United States* v. *Brechtel*, 997 F.2d 1108 (5th Cir. 1993) (increasing limitations period from five to ten years for participation in unlawful savings and loans transaction); *United States* v. *Taliaferro*, 979 F.2d 1399 (10th Cir. 1992) (increasing limitations period from five to ten for false statements to insured banks); *United States* v. *Knipp*, 963 F.2d 839 (6th Cir. 1992) (increasing limitations period from five to ten years for scheme to defraud federally insured institution); *Clements* v. *United States*, 266 F.2d 397 (9th Cir.) (increasing limitations period from three to five years for transportation of females for purposes of prostitution), cert. denied, 359 U.S. 985 (1959); *Falter* v. *United States*, 23 F.2d 420 (2d Cir.) (increasing limitations period from three to six years for conspiracy to defraud the United States), cert. denied, 277 U.S. 590 (1928).

3. In *Falter* v. *United States*, 23 F.2d 420 (2d Cir.), cert. denied, 277 U.S. 590 (1928), the court, in an opinion by Judge Learned Hand, held that a statute that extended the limitations period for the prosecution of an offense committed before the statute's enactment did not violate the prohibition against ex post facto laws where the effect of the statute was to give the prosecution "a longer lease of life," rather than "to revive a prosecution already dead." *Id.* at 425. The court went on to suggest that the result might well be different if the earlier limitations period had expired before the statute's enactment. *Id.* at 425-426. The court explained that, in its view, the question under the Ex Post Facto Clause "turns upon how much violence is done to our instinctive feelings of justice and fair play." *Id.* at 426. That analysis is unsound.

First, as this Court has recognized, "[r]etroactive provisions often serve entirely benign and legitimate purposes," such as "to correct mistakes," "to prevent circumvention of a new statute in the interval immediately preceding its passage," or "to give comprehensive effect to a new law [the legislature] considers salutary." *Landgraf* v. *USI Films Prods.*, 511 U.S. 244, 267-268 (1994). Those legitimate reasons can also support extending the period within which to commence a prosecution on which the statute of limitations had previously expired.

For example, the statute discussed in *Stewart* permitted the prosecution of criminal offenders who would have otherwise escaped prosecution solely because of the exigencies of war. A bill pending in Congress that would toll the limitations period retroactively where a perpetrator is identified through DNA evidence ensures that persons demonstrably guilty of offenses will not escape prosecution simply because such evidence was not previously available. See p. 2, *supra*. And California's law ensures that sex offenders do not escape prosecution simply because their victims were reluctant to report the offenses while under their influence or control.

As those examples demonstrate, a law that permits the prosecution of an offense for which the statute of limitations had previously expired can be entirely consistent with "justice and fair play." *Falter*, 23 F.2d at 426.

More fundamentally, under this Court's decisions, a violation of the prohibition against ex post facto laws does not depend on "instinctive feelings of justice and fair play." *Falter*, 23 F.2d at 426. Instead, "the prohibition which may not be evaded is the one defined by the *Calder* categories." *Collins*, 497 U.S. at 46. Because a law that permits the prosecution of an offense for which the statute of limitations had previously expired does not violate any of the *Calder* categories, it does not violate the Ex Post Facto Clause.

II. A LAW THAT PERMITS THE PROSECUTION OF AN OFFENSE FOR WHICH THE STATUTE OF LIMITATIONS HAD PREVIOUSLY EXPIRED DOES NOT DENY DUE PROCESS OF LAW

A. The Constitutionality Of Retroactive Criminal Laws Is Governed By The Ex Post Facto Clause, Not The Due Process Clause

There is also no merit to petitioner's contention (Br. 31-50) that extending an expired limitations period violates the Due Process Clause. Under this Court's decisions, if a constitutional claim is covered by a specific constitutional provision, that claim must be analyzed under the standard provided by that provision, not under the Due Process Clause. For example, in *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), the Court held that the Fourth Amendment, rather than the Due Process Clause, supplies the standards for deciding whether a seizure of a free citizen is constitutional. The Court reasoned that, "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion

of 'substantive due process,' must be the guide for analyzing these claims." *Ibid.*

Similarly, in *Sattazahn* v. *Pennsylvania*, 123 S. Ct. 732 (2003), the Court held that where a jury deadlocked at the defendant's capital sentencing hearing, a judge imposed a life sentence without making a finding concerning the presence or absence of aggravating factors, and the defendant succeeded in having his conviction set aside on appeal, the Double Jeopardy Clause did not bar the imposition of a capital sentence after a retrial. The Court then summarily rejected the defendant's due process claim, holding that "[w]e decline petitioner's invitation to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause." *Id.* at 742.

The analysis used in *Graham* and *Sattazahn* is also applicable here. The Constitution contains an explicit textual restraint on a legislature's enactment of ex post facto laws. That specific constitutional prohibition, rather than generalized notions of due process, supplies the standard for evaluating whether a retroactive criminal statute is constitutional. The Court should "decline petitioner's invitation to hold that the Due Process Clause provides greater [ex post facto] protection than does the [Ex Post Facto Clause]." *Sattazahn*, 123 S. Ct. at 742.

B. The Benefit Of An Expired Limitations Period Is Not A Fundamental Right

Even if a separate due process analysis were warranted, a law that permits prosecution of an offense for which the statute of limitations had previously expired does not implicate any right that is fundamental for due process purposes. In *Chase Securities Corp* v. *Donaldson*, 325 U.S. 304, 314 (1945), the Court unanimously held that "the shelter provided by the expiration of a limitations period has never been regarded as what is now called a 'fundamental' right or

what used to be called a 'natural' right of the individual." The Court further held that while a defendant "may, of course, have the protection of the policy while it exists, * * * the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Ibid.* In reaching that conclusion, the Court emphasized that "[s]tatutes of limitations find their justification in necessity and convenience rather than in logic," and represent "expedients, rather than principles." *Ibid.* The Court also emphasized "[t]his is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability." *Id.* at 316. The Court accordingly reaffirmed its holding in *Campbell* v. *Holt*, 115 U.S. 620, 627-628 (1885), that reviving an expired civil cause of action does not violate Due Process. See also *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 229 (1995) (reaffirming that statutes of limitations "can be extended, without violating the Due Process Clause, after the cause of action arose and even after the statute itself has expired"); *Electrical Workers* v. *Robbins & Meyers*, 429 U.S. 229, 243 (1976) (upholding constitutionality of an Act of Congress that revived a cause of action that was time-barred before its enactment).

Chase and *Campbell* involved civil actions, but the Court's analysis applies equally to criminal cases. Criminal statutes of limitations, like civil statutes of limitations, reflect pragmatic public policy judgments, rather than personal entitlements. Indeed, the Court has concluded that the policies that underlie criminal statutes of limitations largely track the policies that underlie civil limitations periods. *United States* v. *Marion*, 404 U.S. 307, 322-323 & n. 14 (1971) (noting that statutes of limitations are designed to promote societal repose, to guard against the dangers of a trial where mate-

rial evidence has been lost or has become stale, and to encourage the filing of actions promptly). Equally important, just as the defendants in *Chase* who where charged with securities fraud could not legitimately claim that they did so in reliance on the limitations period, here, those who commit crimes cannot legitimately claim that did so in reliance on the existing limitations period. Thus, like a civil defendant, a criminal defendant does not have a fundamental right to the benefit of an expired limitations period.

When a retroactive statute does not impinge on a fundamental right, the relevant inquiry under the Due Process Clause is whether "the retroactive application of the legislation is itself justified by a rational legislative purpose." *United States* v. *Carlton*, 512 U.S. 26, 31 (1994). California's statute satisfies that standard. California extended its limitations period for sexual offenses prospectively based on evidence that minors who are victims of sexual offenses often fail to report them in time to permit timely prosecution because they are under the influence or control of the offenders. *Frazer*, 88 Cal. Rptr. 2d at 316-317. It was entirely rational for California to conclude that the same rationale justified extending its new limitations period to crimes committed before the statute's enactment.

C. Petitioner's Remaining Contentions Are Unpersuasive

Petitioner's remaining contentions are all without merit. Petitioner seeks to analogize his claim (Pet. 36) to one where the government fails to honor a plea agreement. But a statute of limitations bears no resemblance to a plea agreement. In a plea agreement, the government promises to do something to assist the defendant, and the defendant, in turns, agrees to do something of value to the government—plead guilty. In contrast, a statute of limitations does not contain any promise from the government, and a person does not

agree to do anything of value for the government in order to obtain the benefits of the limitations period. Accordingly, the principle that the government is obliged to honor its plea agreements, see *Santobello* v. *New York*, 404 U.S. 257, 262-263 (1971), has no application here.

Petitioner's reliance (Br. 47) on *Raley* v. *Ohio*, 360 U.S. 423, 437-438 (1959), is also misplaced. There, the government assured the defendant that he was not required to answer certain questions, and then prosecuted him for failing to answer those very questions. The Court held that the government's conduct constituted "active misleading" and "the most indefensible sort of entrapment." *Id.* at 438. In the present context, there is neither active misleading nor entrapment. A statute of limitations contains no assurance that it will not be retroactively modified, and a person who engages in criminal conduct is not entrapped into doing so by the existing limitations period.

Finally, petitioner's concern (Pet. 47) that a person may not preserve information material to a defense after a limitations period has expired does not lead to the conclusion that extending an expired limitations period violates due process. The same concerns could be voiced with respect to civil liability, yet the Court's rulings in *Campbell* and *Chase* reject a per se due process rule. Rather, in a criminal case, the government's delay in bringing a prosecution implicates the Due Process Clause only when there is evidence of "actual prejudice" from the delay. *Marion*, 404 U.S. at 324. Even actual prejudice is insufficient by itself to establish a due process violation. In addition, a court must consider the government's reasons for the delay. *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977). Here, petitioner has failed to assert, much less show, that the State's delay in filing charges against him has prejudiced his defense.

CONCLUSION

The judgment of the Court of Appeal of California should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

MARION R. STOGNER,
Petitioner,

v.

CALIFORNIA,
Respondent.

On Writ of Certiorari to the Court of Appeal of California, First Appellate District

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors.[1] Among the NACDL's objectives are to promote the proper administration of justice and to ensure that newly enacted criminal laws are not unfairly applied to past conduct. To those ends, NACDL has appeared as *amicus curiae* in this Court on numerous occasions, including several ex post facto cases. *See, e.g., Carmell v. Texas,* 529 U.S. 513 (2000).

The California Attorneys for Criminal Justice ("CACJ") is a non-profit corporation founded in 1972. It has 2,400 dues-paying members, primarily criminal defense lawyers. A principal purpose of CACJ, as set forth in its by-laws, is to defend the rights of individuals guaranteed by the United States Constitution. CACJ has appeared in this Court as *amicus curiae* on numerous occasions. CACJ has also participated in litigating the constitutional issues in this case by filing an amicus brief in *People v. Frazer*, 21 Cal. 4th 737 (1999). CACJ also has special expertise in aspects of California criminal law that may assist the Court in its resolution of this case.

Because a law that revives an expired limitations period on a crime contravenes the fundamental notions of justice embodied in the Ex Post Facto Clause, NACDL and

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amici* state that no counsel for a party authored any part of this brief, and no person or entity, other than *Amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

CACJ respectfully submit this brief *amici curiae* in support of Petitioner.

SUMMARY OF ARGUMENT

California Penal Code 803(g) violates the Ex Post Facto Clause at least as applied to any charged offense that allegedly was committed before January 1, 1991.

I. The first and fourth categories of the ex post facto prohibitions enunciated in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), bar States from amending their criminal law to retroactively eliminate an essential ingredient for conviction or otherwise to allow different evidence to convict an offender than was required when the act was committed. Section 803(g) of the California Penal Code violates these prohibitions. At the time that Petitioner allegedly committed the charged offenses, California law required the State, in order to secure a conviction, to allege and prove that the offenses occurred within three years of the filing of the indictment. Section 803(g) relieves the State of its obligation to prove this fact and substitutes a very different requirement that is much easier to satisfy: demonstrating that the indictment was filed within one year of a victim's allegation, regardless of how many years have passed. Because the only way for the State to convict Petitioner is to invoke this new law, the Ex Post Facto Clause prohibits it from retroactively applying it here.

It is immaterial for constitutional purposes whether §803(g)'s elimination of the original limitations period alters the nature of the prohibited conduct at issue here. The history of *Calder*'s first category demonstrates that the Ex Post Facto Clause applies to *all* retroactive laws that allow States to convict an individual who was otherwise legally beyond their reach. And even if it could fairly be said that §803(g) merely replaces the expired limitations period with

another one that the State may now satisfy, the statute still permits a conviction on "different" evidence "than the law required at the time of the commission of the offense," in violation of *Calder*'s fourth category. 3 U.S. at 390.

II. Prohibiting States from prosecuting individuals after original limitations periods have expired comports with the purposes of the Ex Post Facto Clause. It safeguards fundamental fairness by requiring the government to abide by the rules it established to govern the circumstances under which it could deprive people of their liberty. It also protects the presumption of innocence by "preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *United States v. Marion*, 404 U.S. 307, 322 n.14 (internal quotation and citation omitted). Finally, forbidding prosecutions of previously time-barred criminal cases restrains potentially vindictive legislation by preventing States from singling out unpopular groups in order to make it easier to punish them for past conduct.

The California Supreme Court in *People v. Frazer*, 21 Cal. 4th 737 (1999), ignored these red flags because of its view that the Ex Post Facto Clause is limited to ensuring that people can assess in advance whether a particular course of conduct is criminal in nature. But this Court has squarely rejected this notion. All nine Justices in *Carmell v. Texas*, 529 U.S. 513 (2000), agreed that retroactive laws need not alter the characterization of criminality in order to implicate the Ex Post Facto Clause. And in the civil context, this Court recently held that applying a law retroactively to create jurisdiction when it otherwise would not have existed is as impermissible as "reviv[ing] a moribund cause of action." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 950 (1997). Constitutional concerns regarding the

unfairness of retroactive legislation pertain whenever a new cause of action is created.

III. The history and function of limitations periods also support refusing to the State to apply §803(g) retroactively. Criminal statutes of limitations always have been understood to provide repose – that is, a conclusive bar to prosecution – when they expire. But if this Court were to hold here for the first time that a State may prosecute an individual after the original limitations periods have expired, then statutes of limitations will become essentially revocable at will. This would damage the public's faith in the stability of the law and open the door to political abuses of power. What is more, if States could revive expired statutes of limitations, then they seemingly could retract other types of legislative grants of immunity and amnesty. All of this uncertainly would undermine, if not abrogate, the well-established rule that the Fifth Amendment privilege against self-incrimination does not apply after a limitations period has run or a defendant otherwise has obtained immunity. This Court should resist issuing a ruling that would cast these settled principles into disarray.

ARGUMENT

Because we believe that this case can be fully resolved on ex post facto grounds, and for considerations of space, *Amici* will confine ourselves to that issue.[2]

I. Section 803(g) Attaches Criminal Liability to Conduct Previously Beyond the State's Reach, in Violation of *Calder*'s First and Fourth Ex Post Facto Categories.

A. The Ex Post Facto Clause Prohibits Laws That Retroactively Eliminate or Change Facts Necessary to Convict Defendants.

The Ex Post Facto Clause, in perhaps its most vital application, prohibits laws that eliminate or relax an ingredient of the State's burden of proof – thereby bringing past conduct that was otherwise beyond the government's reach within its power to prosecute and punish. In his definitive exposition of the Ex Post Facto Clause in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), Justice Chase explained that the Clause forbids "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action" and "4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." *Id.* at 390 (emphasis in original). This Court reaffirmed these prohibitions in *Carmell v. Texas*, 529 U.S. 513 (2000), describing these *Calder* categories as precluding laws "retrospectively eliminating an element of the offense,"

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[2] Many of the arguments that follow, of course, also pertain to the due process question presented, for both the Ex Post Facto and Due Process Clauses are designed to guarantee fundamental justice and basic fairness.

Carmell, 529 U.S. at 532, or allowing "different . . . evidence" to convict a defendant "than was required, when the act was committed." *Id.* at 524 (quotation omitted). Retroactive laws falling into these first and fourth categories are close cousins, for in each instance the change in law permits the government to convict defendants who otherwise would have been entitled to acquittals as a matter of law. In each instance, the vice of retroactively applying the new law is that it relieves the government of its prior obligation to prove a fact it concedes that it cannot now establish.

Laws retroactively eliminating or altering the facts necessary to establish guilt are different, and more objectionable, than the Texas law this Court disallowed in *Carmell*. The law in *Carmell* did not alter the essential facts necessary for conviction, but rather merely allowed them to be satisfied with *less* evidence. Section 803(g) fundamentally changes the facts that the State must prove to convict people of lewd conduct offenses, in a manner that allows conviction on *different* evidence than was required when the act was allegedly committed. Although *Calder*'s fourth category forbids retroactive changes allowing conviction on both "less, or different" evidence, *see* 3 U.S. at 390, only the latter type of change completely relieves the government of a prior duty to prove a certain fact regarding the charged offense.

Laws eliminating or altering facts that the government formerly had to prove also are qualitatively different than those that are simply "procedural," that is, that merely adjust "the procedures by which a criminal case is adjudicated." *Collins v. Youngblood*, 497 U.S. 37, 45 (1990); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.28 (1994) (noting Ex Post Facto Clause's distinction between procedural and substantive rules); *Hopt v. Utah*, 110 U.S. 574 (1884) (upholding retroactive application of witness competency statute because it affected only trial procedure). Only the former affect "the substantive law of crimes,"

Collins, 397 U.S. at 45, or as this Court earlier put it, "the legal definition of the offense." *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925). Accordingly, as this Court explained over 100 years ago, the Ex Post Facto Clause prohibits States retroactively from "chang[ing] the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt*, 110 U.S. at 590.

B. Limitations Periods Are Facts Necessary for a Conviction Under California Law.

For all persons like Petitioner who are charged with committing lewd conduct before 1991, § 803(g) retrospectively eliminates one of "the ultimate facts" that formerly was "necessary to establish guilt." *Hopt*, 110 U.S. at 590.[3] The unwavering rule in California is that "[a]n accusatory pleading must allege facts showing that the prosecution is not barred by the statute of limitations." *In re Demillo*, 14 Cal. 3d 598, 601 (1975); *accord People v. Zamora*, 18 Cal. 3d 538, 565 n.26 (1976); *People v. Crosby*, 58 Cal. 2d 713, 724-25 (1962). An indictment that reveals on its face that prosecution is barred by the statute of limitations "fails to state a public offense," *People v. Rehman*, 62 Cal. 2d 135, 139 (1964), and "no judgment of conviction could be based upon it." *People v. Hoffman*, 132 Cal. App. 60, 62 (1933); *accord People v. McGee*, 1 Cal. 2d 611, 613 (1934).

After the indictment is filed, "[t]he burden of proof is on the [State] to show that the offense was committed within the time period provided within [the limitations period]

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[3] Applying § 803(g) to persons accused of committing offenses between 1991 and 1993 may also violate the Ex Post Facto Clause by *extending* the statute of limitations beyond the period prescribed at the time of the charged offenses. But this Court need not address that issue here, for this case, like all pre-1991 charged offenses, concerns only the revival of previously *expired* causes of action.

provided in section 800." *Demillo,* 14 Cal. 3d at 601; *accord Crosby,* 58 Cal. 2d at 725. The California Supreme Court has further explained that:

> Failure to sustain that burden will result in vacation or reversal of the judgment of conviction. . . . It follows that if the evidence upon which the indictment is based is to 'warrant a conviction by a trial jury' (Pen. Code, § 939.8), it must include at least some evidence that the prosecution is not barred by the statute of limitations.

Crosby, 58 Cal. 2d at 725; *see also Zamora*, 18 Cal. 3d at 565 nn.26 & 27 (to hold defendant pending trial, "the [State] bear[s] the burden of producing evidence . . . which demonstrates that there is probable cause to believe that the prosecution is not barred by the statute of limitations"; State also bears ultimate burden at trial). In cases in which there are disputed issues of fact regarding whether the indicted acts occurred within the limitations period, "the limitation issue . . . is a question for the trier of fact," *Zamora*, 18 Cal. 3d at 563, and the court must "instruct [the jury on the] element of the statute of limitations, just as it" must "instruct on an element of the crime itself." *People v. Bell*, 45 Cal. App. 4th 1030, 1065-66 (1996); *see also Zamora*, 18 Cal. 3d at 565 n.27 (noting trial courts should "carefully instruct the jury" on the prosecution's burden of proof as to the statute of limitations); California Jury Instructions Criminal 224 (6th ed. 1996) (standard California jury instruction on statute of limitations).

Finally, proof that the charged offense occurred within the limitations period is, in California, legally essential to the punishment to be inflicted. As the California Court of Appeal put it, "[t]his state has determined that before [criminal defendants] could be convicted of the charged

offenses, a jury must determine that the prosecution came within the limitation period. . . . [A] failure to prove that an offense comes within the limitation period results in a verdict of not guilty." *Bell*, 45 Cal. App. 4th at 1065. If the jury finds, in other words, that the prosecution has failed to carry its burden of proof on the statute of limitations issue, it must acquit the defendant of the charged crime.

Indeed, California has determined that proof that the alleged offense occurred within the limitations period is so important that, unlike most other ingredients of crimes, a defendant may raise the issue for the first time on appeal, *People v. Chadd*, 28 Cal. 3d 739, 757 (1981), or on collateral attack in a state petition for writ of habeas corpus. *Demillo*, 14 Cal. 3d at 602 (granting state habeas relief); *see also McGee*, 1 Cal. 2d at 613 (issue may be raised at any time). Even defendants who plead guilty may prevail on this issue on appeal. *See Zamora*, 18 Cal. 3d at 547. In this sense, California deems compliance with the statute of limitations to be a jurisdictional fact that must be pled and proven by the prosecution in every criminal case. *See People v. Williams*, 21 Cal. 4th 335, 337 (1999) (collecting cases terming issue "jurisdictional"); *Demillo*, 14 Cal. 3d at 601-02; *Crosby*, 58 Cal. 2d at 724-25; 2 Witkin & Epstein, California Criminal Law 581 (3d ed. 2000) ("Because the statute of limitations is jurisdictional and need not be specifically pleaded as a defense, the defendant's plea of not guilty raises the issue.").

Simply put, it has been "well-established" in California, both before and since the enactment of § 803(g), "that the statute of limitations is a substantive matter which the prosecution must prove" just like "any other 'element' of its case." *People v. Le,* 82 Cal. App. 4th 1352, 1360 (2000); *see also People v. Gordon,* 165 Cal. App. 3d 839, 852 (1985) (proof that charged acts occurred within limitations period is "an essential element of the offense"); *People v. Doctor,* 257

Cal. App. 2d 105, 110 (1967); *People v. Allen*, 47 Cal. App. 2d 735, 748 (1941) (same). If the prosecution is unable to show that the charged offense occurred inside of the limitations period, the State cannot punish the defendant.[4]

C. The Prohibition Against Eliminating Facts Necessary for a Conviction Is Not Limited to Facts Defining the Nature of the Prohibited Conduct at Issue.

Because Section 803(g) retroactively alters an element of Petitioner's alleged offenses in order to allow the State to convict him, it is a classic ex post facto law. In 1973 – the most recent time that Petitioner is alleged to have violated the law – California law required the State in any prosecution for lewd conduct to prove to a jury that the defendant violated the law three years or less prior to his indictment. Cal. Penal Code § 800 (1972), replaced by § 800 (1984) (three-year period). That limitations period expired in 1976, and when the State enacted § 803(g) in 1994, there is no dispute that Petitioner's alleged transgressions were beyond the reach of the criminal law. Section 803(g), however, retroactively

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[4] California, of course, is not alone in treating limitations periods as ingredients of the prosecution's burden of proof. Federal law does the same thing. *See Grunewald v. United States*, 353 U.S. 391, 396 (1957) (it is "incumbent on the Government to prove" that prosecution was instituted within applicable statute of limitations); *United States v. Antico*, 275 F.3d 245 (3d Cir. 2001) (same); *United States v. Frank*, 156 F.3d 332 (2d Cir. 1998) (jury must be instructed on statute of limitations). Indeed, such has been the rule from the early days of criminal law in the United States. *See, e.g., United States v. Smith*, 27 F. Cas. 1158 (C.C. Conn. 1809) (No. 16,332) (government must prove statute of limitations); *United States v. White*, 28 F. Cas. 570 (C.C.D.C. 1837) (No. 16,678) (government must plead and prove statute of limitations); *United States v. Johnson*, 26 F. Cas. 621 (C.C. Ohio 1879) (No. 15,483) (same).

erases the State's prior duty to prove that the charged offenses occurred less than three years ago and makes it possible for the State to obtain a conviction that otherwise was impossible. This limitations revival statute impermissibly relaxes the State's burden of proof.

The California Supreme Court's ruling that applying § 803(g) retroactively does not violate Calder's first category because, strictly speaking, it "makes no change in the *act or intent* elements which the prosecution must prove," *People v. Frazer*, 21 Cal. 4th 737, 760 (1999) (emphasis added) misapprehends the nature of the *Calder* categories. Justice Chase stated in *Calder* that the Ex Post Facto Clause prohibits retroactive laws falling into his four categories "and similar laws." 3 U.S. at 391. Accordingly, the four *Calder* categories are to be read as illustrative types of laws that violate the constitutional prohibition against retroactive criminal legislation, not as rigid, limited classifications that may be divided and conquered. *See id.* at 171; *Weems v. United States*, 217 U.S. 349, 373-74 (1910) (rejecting a "narrow and restrictive construction" of the *Calder* categories in favor of a "more extensive application"). "If the inhibition" against ex post facto laws "could be evaded by the form of the enactment, its insertion into the fundamental law was a vain and futile proceeding." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866).

Properly understood, *Calder*'s first category prevents the government from retroactively erasing any fact that has an effect tantamount to eliminating an element of an offense – that is, *any* fact that determines whether the defendant can be convicted of the charged offense, regardless of whether the fact goes directly to the nature of the prohibited conduct. In *Calder* itself, Justice Chase noted that retroactive laws that "inflicted punishments, where the party was not, by law, liable to any punishment" before the law was passed violated the Ex Post Facto Clause. 3 U.S. at 389.

He further explained, on the other hand, that applying a law retroactively "to save time from the statute of limitations" – that is, to shorten the limitations period that existed at the time the alleged offense was committed – would be acceptable because it would "mollif[y] the rigor of the criminal law." *Id.* at 391. The inescapable implication of these statements is that a law that revived an expired statute of limitations would violate the Ex Post Facto Clause, for it would enlarge the scope of the criminal law by bringing within its reach an act that otherwise "was not, by law, liable to any punishment." *Id.* at 389.

Justice Chase's opinion in *Calder* also "embraced" "the authoritative exposition" of the ex post facto guarantee found in the common law treatise of Richard Wooddeson. *Carmell,* 529 U.S. at 522-24. In describing what became *Calder*'s first category, Wooddeson illustrated the scope of the prohibition against retroactive changes that "respect the crime":

> It has been usual, in times of domestic rebellion, to pass acts of parliament inflicting the pains of attainder on those by name, who had levied war against the king, and had fled from justice, provided they should not surrender by a day prefixed. . . . No alteration is made in the rules of evidence. Supposing the prisoner's identity of person, or his surrendering by the time limited, be contested, these questions are to be decided by the same testimony as would be admissible in other trials. Neither is there any varied modification of punishment. *But a material innovation is made respecting the crime.* For neglecting to surrender by the appointed day constitutes, or rather indeed consummates the new treason, against which the attainder is directed. Until

> that time it is unchoate, and unripe for the operation of the particular statute.

2 Richard Wooddeson, A Systematical View of the Laws of England 625-26 (1792) (Lecture 41) (emphasis added).[5]

Although the State asserts that retroactive changes in limitations periods are immune from ex post facto scrutiny on the ground that they "merely address[] when the state may prosecute certain criminal charges," Brief in Opp. at 11, Wooddeson's classification of a change in the timeline for litigating an individual's guilt as "material innovation . . . respecting the crime," Wooddeson, *supra,* at 626, demonstrates that such prohibited retrospective innovations include more than simply changes in the substantive conduct defining the nature of the offense. The surrender deadline that Wooddeson described did not alter the nature of the prohibited act of treason. But applying this new law retroactively nevertheless created, in his view, a new crime. And given that a new law redefining the time period in which a defendant has a right to prove his innocence triggers ex post facto protections, so does a new law that redefines the time period in which the government has a right to prove his guilt. The laws are mirror images of each other; they both set a deadline by which one party must act before forever losing the right to litigate a criminal case. And both types of laws are designed to permit the conviction of persons who have become beyond the government's criminal jurisdiction.

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[5] That the laws that Wooddeson was describing were also bills of attainder does not detract from their relevance as examples of ex post facto laws. *See Carmell,* 529 U.S. at 536 (Wooddeson thought that all laws he described in Lecture 41 were ex post facto laws). Indeed, "*all* of the specific examples listed by Justice Chase" and Wooddeson "were passed as bills of attainder." *Id.* at 537.

The State's final protestation that § 803(g) "actually *increases* the procedural burdens on the government" because now the State "must produce 'independent evidence that clearly and convincingly corroborates the victim's allegation,'" Brief in Opp. at 11 (quoting § 803(g)(2)(B)), does not alter this analysis. As an initial matter, § 803(g) does not "increase" the State's burden of proof. Before that law was enacted, there was only one way for the State to satisfy the limitations-period element in this case: show that the crime occurred less than three years prior to the indictment. The State cannot meet that duty in this prosecution. But § 803(g) creates a second, or alternate, way of satisfying that prior obligation. That statute, therefore, plainly *reduces* the State's burden of proof by giving it an alternative way of securing a conviction.

Even if § 803(g)(2)(B)'s new "independent evidence" requirement – along with the State's new obligation to show that the indictment was filed within one year of the victim's report to law enforcement, *see* § 803(g)(1) – could be said to *replace*, instead of reduce, the old within-three-years-of-offense requirement, § 803(g) still permits a conviction on "different" evidence "than the law required at the commission of the offence," in violation of *Calder*'s fourth category. *Calder,* 3 U.S. at 390; *accord Carmell,* 529 U.S. at 524 (fourth category prohibits laws "whereby different . . . evidence, is required to convict an offender, than was required, when the act was committed") (quoting Joseph Story, 3 Commentaries on the Constitution of the United States § 1339, at 212 (1833)). The mere fact that a law replaces an element that it retroactively eliminates with a new element that the State can now prove does not save it from the ex post facto infirmity.

The decisive question for ex post facto purposes is whether the retroactive law at issue changes the substance of what the government must prove in order to convict the

defendant. *See, e.g., Hopt,* 110 U.S. at 590. Analyzed through this lens, there can be no dispute that § 803(g) changes the facts necessary for conviction under California law and, hence, violates the Ex Post Facto Clause.

II. Prohibiting Revivals of Stale Criminal Cases Comports With the Purposes of the Ex Post Facto Clause.

Not only does § 803(g) contravene the ex post facto prohibitions spelled out from *Calder* to *Carmell*, but this limitations revival statute also treads on the core concerns of the Ex Post Facto Clause. This Court explained in *Carmell* that the Clause protects the "fundamental fairness" of the justice system, "even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell*, 529 U.S. at 532-33. "In each instance [in which the Clause is violated], the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction." *Id.*

A state law that allows the government to bring an otherwise stale criminal prosecution flouts this precise interest in fundamental fairness. Such laws can help only the government. There is no way, once the original limitations period has expired, that relieving a State of its prior duty to prove that the charged offense occurred within that period can possibly give an advantage to a defendant. Accordingly, as Judge Learned Hand explained long ago, allowing a State "to revive a prosecution already dead" violates "our instinctive feelings of justice and fair play." *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir. 1928). "For the state to assure a man that he has become safe from pursuit," he continued, "and thereafter to withdraw its assurance, seems to most of us unfair and dishonest." *Id.* at 426.

Section 803(g), like other ex post facto laws, also "subvert[s] the presumptions of innocence." *Carmell,* 529 U.S. at 540 (quoting *Cummings,* 71 U.S. at 328). "Passage of time . . . may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself." *United States v. Marion,* 404 U.S. 307, 321 (1971). This Court, therefore, has long observed that limitations periods protect the presumption of innocence by "preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 322 n.14 (quoting *Order of R.R. Telegraphers v. Railway Express Agency,* 321 U.S. 342, 348-49 (1944)); *see also United States v. Kubrick,* 444 U.S. 111, 117 (1979) (limitations periods "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."). "[T]he applicable statute of limitations," in fact, is "the primary guarantee against bringing overly stale criminal charges. . . . These statutes provide predictability by specifying a limit beyond which there is an irrebutable presumption that a defendant's right to a fair trial would be prejudiced." *Marion,* 404 U.S. at 322.[6]

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[6] The California Supreme Court has explained that limitations periods in that State are based on these same principles. *See Addison v. State*, 21 Cal. 3d 313, 317 (1978) ("The statutes, accordingly, serve a distinct public purpose, preventing the assertion of demands which, through the unexcused lapse of time, have been rendered difficult or impossible to defend."); *Wood v. Elling Corp.*, 20 Cal. 3d 353, 362 (1977) (adopting this Court's description of limitations periods in *Order of R.R. Telegraphers*); *California Sav. & Loan Soc'y v. Culver,* 127 Cal. 107, 110 (1899) ("Statutes of limitation are intended to prevent stale claims from springing up after the lapse of long periods of time . . . when loss of papers, deaths of witnesses, and worn-out recollections make the presentation of the actual facts in the case impossible or extremely difficult.").

It does not soften § 803(g)'s blow against the presumption of innocence that the State is required to produce clear and convincing evidence corroborating the victim's allegation in order to bring an otherwise time-barred prosecution. Limitations periods are not designed to push the prosecution to solidify its cases. To the contrary, they are designed for "the protection of those who may (during the limitation) . . . have lost the *means of their defence.*" *Id.* at 322 (internal quotation omitted) (emphasis added); *see also Toussie v. United States,* 397 U.S. 112, 114-15 (1979) (limitations periods are "designed to protect *individuals* from having to defend themselves against charges when basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past") (emphasis added); *Burnett v. New York Central R.R. Co.,* 380 U.S. 424, 428 (1965) (limitations periods "are primarily designed to assure fairness to *defendants*") (emphasis added).

Many individuals, in fact, trusting that statutes of limitations are binding on their governments, may over time discard items that would prove their innocence of potential charges against them. Permitting States to revive their own expired statutes of limitations would turn what these citizens have always assumed to be guarantees of immunity into traps for the unwary. In this sense, § 803(g)'s independent-evidence prerequisite actually compounds the unfairness of the State's limitations revival statute, for it means that stale prosecutions will be brought when only the *defendant* is likely to face evidentiary disadvantages due to the extreme passage of time.

Finally, there is an aspect of vindictiveness in § 803(g). The Ex Post Facto Clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 29 (1981). That is to say, the Clause, along with the prohibition against bills of attainder, prevents States from singling out a particular type of crime and changing the rules to allow them to lasso certain individuals who they feel have escaped punishment (or not gotten enough punishment) under the old rules. In *Cummings*, for instance, this Court held that a law punishing individuals who refused to pledge their past loyalty to the United States, violated the Ex Post Fact Clause in part because it was "aimed at past acts," namely aiding the Confederacy in the Civil War. 71 U.S. at 327.

Section 803(g) implicates this same concern over vindictiveness. Child molestation is a horrible crime, and many in our current society, quite understandably, focus a particular outrage at those who appear to have "gotten away with it." Furthermore, unlike even the sexual molestation law at issue in *Carmell*, § 803(g) explicitly covers crimes that occurred "arising before" its effective date, and its very text reveals that the Legislature was keenly aware of its ex post facto implications. § 803(g)(3)(A) & (3)(A)(iii)-(iv). This suggests that the California Legislature, like many in society at large, may have borne some special resentment against persons accused of sexual offenses.

In spite of these red flags, the California Supreme Court stated in *Frazer* that § 803(g) does not trigger ex post facto protections because limitations periods are an "optional form of 'legislative grace'" and because "[t]he primary purpose of th[at] constitutional guarantee is to ensure that the consequences of a particular *course of conduct* can be meaningfully assessed in advance, without fear that the rules of criminality and punishment will later change." 21 Cal. 4th at 758, 760; *see also* Brief in Opp. at 5 (arguing that § 803(g)

does not "make[] innocent conduct criminal"). But both of these statements contravene this Court's precedent. This Court already has held squarely that "even if a statute merely alters penal provisions *accorded by the grace of the legislature*, it violates the [Ex Post Facto] Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." *Weaver*, 450 U.S. at 30-31 (emphasis added). The critical issue in assessing ex post facto challenges is not whether the defendant has a "right" to the prior, more lenient law; it is whether the subsequent, more severe law existed at the time when the crime was consummated. *Id.*

In addition, this Court's decisions make it clear that the Ex Post Facto Clause is intended to do more than ensure that individuals can assess whether "a particular course of conduct" is prohibited by law. *Frazer,* 21 Cal. 4th at 760. In reaffirming the vitality of *Calder*'s fourth category in *Carmell*, this Court expressly rejected the idea that a retroactive law must redefine the nature of prohibited conduct in order to violate the Ex Post Facto Clause. Using the infamous case of Sir John Fenwick as an example, this Court explained that:

> Fenwick could claim no credible reliance interest in the two-witness statute [that was in effect at the time of his actions], as he could not possibly have known that only two of his fellow conspirators would be able to testify to his guilt, nor that he would be successful in bribing one of them to leave the country. Nevertheless, Parliament had enacted the two-witness law, and there was a profound unfairness in Parliament's retrospectively altering the very rules it had established – *notwithstanding the fact that Fenwick could not truly claim to be "innocent."* . . . The Framers,

> quite clearly, viewed such maneuvers as grossly unfair, and adopted the Ex Post Facto Clause accordingly.

529 U.S. at 533-34 (emphasis added).

Although the *Carmell* dissenters disagreed as to whether *Calder*'s fourth category applies to laws that reduce the quantum of evidence necessary for convictions, they agreed that a law need not alter the characterization of criminality to implicate the Ex Post Facto Clause. Like the Fenwick case, the dissent's example of a category four violation – "[l]aws that reduce the burden of persuasion the prosecution must satisfy to win a conviction," such as a statute allowing the government to prove "leadership role in the offense" by a preponderance instead of beyond a reasonable doubt, *id.* at 572 (Ginsburg, J., dissenting) – does not in any way change the nature of the prohibited conduct at issue. The same was true of the Reconstruction-era law that this Court invalidated on ex post facto grounds in *Cummings v. Missouri,* which required certain individuals to establish their innocence of aiding or countenancing the Rebellion during the Civil War by making an "expurgatory oath," but which "did not, in terms, define any crimes." 71 U.S. at 326-28.

To the extent that any doubt remains regarding whether revivals of stale limitations periods trigger the evils of retroactivity that the Ex Post Facto Clause is designed to prevent, this Court's opinion in *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939 (1997), closes the issue. There, this Court held that a law expanding the circumstances under which individuals could bring *qui tam* suits could not be applied retroactively because it "change[d] the substance of the existing cause of action for *qui tam* defendants." *Id.* at 948. In response to the plaintiff's argument that the new law could apply retrospectively

because it was merely jurisdictional, the unanimous Court invoked the presumption against retroactivity – which is derived in substantial measure from the Ex Post Facto Clause, *see id.* at 948 (citing *Collins* and *Beazell*); *Landgraf,* 511 U.S. at 266 & 275 n.28; *Kaiser Aluminum & Chem. Corp. v. Bonjourno,* 494 U.S. 827, 856 (1990) (Scalia, J., concurring) – and held that the law could not so apply because rather than "affect[ing] only *where* a suit may be brought," it determined "*whether* it may be brought at all." *Hughes Aircraft,* 520 U.S. at 951. In other words, a law that created jurisdiction when it otherwise would not have existed anywhere could not be applied retroactively because the new law effectively created a new cause of action.

In language directly relevant to the case at hand, this Court further explained:

> Prior to the 1986 amendment, [plaintiff's] *qui tam* action was completely barred because of Hughes' disclosure to the Government of information about its claim submissions. The 1986 amendment would revive that action, subjecting Hughes to previously foreclosed *qui tam* litigation, *much like extending a statute of limitations after the pre-existing period has expired impermissibly revives a moribund cause of action, see, e.g., Chenault v. U.S. Postal Service,* 37 F.3d 535, 537, 539 (9th Cir. 1994) (relying on *Landgraf* in concluding that "a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would alter the substantive rights of a party . . . .").

Hughes Aircraft, 527 U.S. at 950 (emphasis added); *see also Le,* 82 Cal. App. 4th at 1360 ("the statute of limitations is a substantive matter" in California).[7] If ex post facto considerations do not allow statutes to revive a "moribund cause of action" in the civil context, then they must foreclose such laws in the criminal context.

III. Prohibiting Revivals of Stale Criminal Cases Is Necessary to Sustain the Historical Understanding of Statutes of Limitations and the Web of Jurisprudence That Depends on That Understanding.

The history and function of limitations periods also support refusing to apply § 803(g) retroactively. Indeed, such a ruling is necessary to avoid upsetting centuries of precedent that depends on the notion that people are immune from prosecution once a statute of limitations has expired.

A. The History and Function of Statutes of Limitations.

"Statutes of limitation . . . are found and approved in all systems of enlightened jurisprudence," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), and their antecedents can be traced back for centuries. "Statutes of limitation relating to real property may be traced to ancient Greece or beyond." Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453, 455 (1997) (citing William D. Ferguson, The Statute of Limitations Savings Statutes 7 (1978)). "Emperors Honorious and Theodosius . . . moved by obvious considerations of

[7] All other courts of appeals to reach the issue have agreed with the Ninth Circuit's holding in *Chenault. See, e.g., Stone v. Hamilton,* 308 F.3d 751, 757 (7th Cir. 2002); *Million v. Frank,* 47 F.3d 385, 390 (10th Cir. 1995); *Rowe v. Sullivan,* 967 F.2d 186, 194 (5th Cir. 1992).

convenience, enacted in 424 A.D. that all actions should be barred within a certain period." Rudolf Sohm, The Institutes History and System of Roman Private Law 283 (Ledlie trans., 3d ed. 1970). England enacted its first limitations period, concerning property actions, in 1487. *See* Ochoa & Winstrich, *supra,* at 455. "[T]he English statute of limitations of the 21st of James I, . . . was adopted in most of the American colonies before the Revolution, and has since been the foundation of nearly all of the like legislation in this country." *Wood*, 101 U.S. at 139. Today, statutes of limitations are ubiquitous in criminal as well as civil law.

During all this time, it has been universally understood, at least in the criminal context, that lapsed limitations periods afford "repose" because "delay, extending to the limit prescribed, is itself a conclusive bar" to prosecution. *Wood,* 101 U.S. at 139; *see also Kubrick,* 444 U.S. at 117 (limitations periods are "statutes of repose"); *Marion,* 404 U.S. at 322 n.14 (criminal limitations periods "are to be liberally interpreted in favor of repose."); *United States v. Scharton,* 285 U.S. 518, 522 (1932) (same). A well known nineteenth century treatise, for example, described criminal statutes of limitations as granting permanent amnesty from the possibility of prosecution:

> Here, the State is the grantor, surrendering by act of grace its right to prosecute, and declaring the offence to be no longer the subject of prosecution. The statute is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offence; that the offender shall be at liberty to return to his country and resume his immunities as a citizen, and that from henceforth he may cease to preserve the proofs of his innocence, for the proofs of his guilt are blotted out. . . . [T]he

> very existence of the statute is a recognition and notification by the legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt.

Francis Wharton, A Treatise on the Criminal Law of the United States § 744 (7th ed. 1874), *quoted in Lamkin v. People*, 94 Ill. 501, 504-05 (1880); *see also Marion*, 404 U.S. at 322 n.14 ("The theory is that . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them.") (internal quotation and citation omitted). Courts, therefore (until this case), consistently have rejected the few legislative attempts to permit the prosecution of stale offenses. *See State v. Cookman*, 920 P.2d 1086 (Or. 1996) (invalidating state law reviving expired limitations period); *Commonwealth v. Rocheleau*, 533 N.E.2d 1333 (Mass. 1989) (same); *Commonwealth v. Guimento*, 491 A.2d 166 (Penn. 1985) (same); *People v. Shedd*, 702 P.2d 267 (Colo. 1985) (same); *Moore v. State*, 43 N.J.L. 203 (N.J. 1881) (same).

Even California repeatedly has avowed that its statutes of limitations are meant to "promote repose, by giving security and stability to human affairs." *Shain v. Sresovich*, 104 Cal. 402, 406 (1894) (quoting *Wood*, 101 U.S. at 139); *see also Bernson v. Browning-Ferris Indus.*, 7 Cal. 4th 926, 935 (1994) ("the primary interest served by statutes of limitations is that of repose"); *Zamora*, 18 Cal. 3d at 574 (limitations periods should be strictly construed in favor of repose); *Pashley v. Pacific Elec. Co.*, 25 Cal. 2d 226, 228-29 (1944) ("The statute of limitations is a statute of repose. . . ."). Its courts, prior to the enactment of § 803(g), went so far as to echo *Wood*'s statement that an expired limitations period "is itself a conclusive bar" to bringing a case, *Shain*, 104 Cal. at 406 (quoting *Wood*, 101 U.S. at 139), and that it "grants prospective defendants relief from the

burden of indefinite exposure to stale claims." *David A. v. Superior Court (Jane D.)*, 20 Cal. App. 4th 281, 285 (1993).

But if this Court were to hold here that States may prosecute individuals for offenses whose original limitations periods have expired, then thousands of statutes of limitations across this country will no longer provide repose. They will become revocable at will. Legislatures, at any time, could identify any particular crime and declare that anyone could be prosecuted for it, no matter when the offense was allegedly committed. The potential for politically motivated abuses of this potential power against unpopular groups is patent.

The resulting damage to the public's ability to gain assurance from the criminal law would be profound. "Time limitations on criminal prosecutions are often supported as fostering a more stable and forward-looking society" in part because people do not always know whether they broke the criminal law in the past. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199, 230 (1982). Although understanding whether one has committed offenses such as child molestation or robbery is usually (but not always) fairly clear cut, people often are quite uncertain as to whether they have committed other crimes. Given the morass of environmental and tax laws, for instance, many businesspeople depend on limitations periods for peace of mind regarding past conduct and in planning for the future. And even for those who know that they have broken the law, such as those who in the distant past experimented with illegal drugs, "[t]he reason of [limitations periods] suggests that with a lapse of time men often give up evil-doing and become more law abiding citizens." *Wolfson v. United States*, 102 F. 134, 135 (5th Cir. 1900) (Boarman, J., dissenting); *see also Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (after extreme passage of time, "even wrongdoers are entitled to assume that their sins will be forgotten").

Removing the guarantee of repose would cause such individuals needless anxiety.

B. Other Areas of Law That Depend on the Irretrievability of Limitations Periods.

A ruling allowing revivals of expired statutes of limitations also would conflict with settled law in other areas. For starters, upholding § 803(g) would seemingly permit the permit retroactive abrogation of other statutory defenses that accrue after the alleged criminal conduct has occurred and that have always been thought to be irrevocable, such as legislative grants of amnesty or immunity in exchange for testimony or other favors to the government. *See, e.g., Brown v. Walker,* 161 U.S. 591, 601-02 (1896) (discussing such congressional and state legislative grants of amnesty); *Frisby v. United States,* 38 App. D.C. 22 (1912) (retroactive application of a law abrogating an immunity statute violated Ex Post Facto Clause). The effectiveness of these methods of obtaining testimony depends on affording witnesses "protection for crime disclosed by [them]" that is "in law, equivalent to [their] legal innocence of the crime disclosed." *Brown,* 161 U.S. at 602 (quoting *State v. Nowell,* 58 N.H. 314 (1878)). "[O]therwise, the statute[s] would be ineffectual." *Id.*

An affirmance here also might allow States to reinstate substantive crimes that they previously repealed and to prosecute those who committed the crimes before the repeals took effect. As long as the conduct was criminal when committed, under the State's position, the Ex Post Facto Clause apparently would not prevent retroactive application of the law reinstating the crime. A legislature could even combine such a law with abolition of the previously existing statute of limitations, rendering people subject to prosecution indefinitely for crimes that had been repealed after they were allegedly committed.

Lastly, allowing revival of criminal statutes of limitation would upset well-established Fifth Amendment precedent. This Court has long held that witnesses may not invoke the Fifth Amendment privilege against self-incrimination after the statute of limitations has run because there is no longer any danger of prosecution. *Hale v. Henkel,* 201 U.S. 43, 66-67 (1906); *Brown,* 161 U.S. at 598-99. This established rule would be open to serious question if statutes of limitation could be revived or eliminated long after they had expired. Witnesses could never be assured that their testimony would not be used against them in some future prosecution.

Statutes of limitation, in short, have a substantial pedigree and are deeply embedded into the fabric of American jurisprudence. This Court should resist any ruling that would not only upset the public's settled expectations regarding their operations and effect, but also that would cast other areas of law that depend on the permanent repose they provide into a state of disarray.

CONCLUSION

For the foregoing reasons, this Court should hold that § 803(g) violates the Ex Post Facto Clause as applied at least to all charged offenses occurring before 1991, including Petitioner's.

Respectfully submitted.

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IN THE

Supreme Court of the United States

MARION R. STOGNER,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of California, First Appellate District

BRIEF OF *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN, AND CALIFORNIA PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 01-1757

MARION R. STOGNER,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Court of Appeal of California, First Appellate District

BRIEF OF *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN, AND CALIFORNIA PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations and associations whose members often are called upon to address the devastating aftermath of child sexual abuse.[1]

[1] No counsel for a party authored any part of this brief. No person or entity other than *amici* and their counsel made any monetary contribution towards the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

The American Psychological Association (APA) is a non-profit scientific and professional organization founded in 1892. APA has more than 155,000 members and affiliates, including the majority of psychologists holding doctoral degrees from accredited universities in this country. APA's members play an important role in the treatment of both victims and perpetrators of child sexual abuse and related research and education. Division 37 of APA—Children, Youth and Family Services—is concerned with professional and scientific issues relative to services and service structures for children and youth. The Division seeks to advance research, education, training, and practice and relate psychological knowledge to other fields such as law and pediatrics. Section 1 of Division 37—Child Maltreatment—is focused expressly on psychological issues surrounding the abuse of children. This Section endeavors to support and promote scientific inquiry, training, professional practice, and advocacy in the area of child maltreatment, including childhood sexual abuse. The California Psychological Association, a professional association affiliated with APA, endorses the position of *amici* in this case.

The National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional organization founded in 1977. NACC has approximately 2,000 members from all fifty states, including attorneys who represent children before family and juvenile courts, physicians, psychologists, social workers, and other professionals concerned with the protection of children. NACC helps train professionals who assist children within the legal system, and educates public officials about the needs of children, including children who have suffered sexual abuse.

The American Professional Society on the Abuse of Children (APSAC) is a multidisciplinary society of professionals working in the fields of child abuse research, prevention, treatment, investigation, litigation, and policy.

Founded in 1987, APSAC has more than 2,500 members, including professionals from all fifty states. APSAC seeks to increase knowledge about abuse and to promote effective identification, intervention, and treatment of abused children, their families, and offending individuals. APSAC's California chapter—the California Professional Society on the Abuse of Children (CAPSAC)—seeks to further these goals in the State of California.

Amici curiae submit this brief to present the relevant scientific knowledge that provides the context for this Court's review of whether a state may extend the statute of limitations for child sexual abuse offenses. While taking no formal position on the constitutionality of the statute at issue, *amici* submit this brief to provide the Court with information that supports the assumptions underlying California's decision to extend the statute of limi.ations. California appropriately recognized that—for a variety of reasons—victims of childhood sexual abuse often wait years before reporting the abuse to law enforcement. California's statute of limitations, therefore, prevents offenders from escaping prosecution based solely on the fact that their victims may be shamed, intimidated, or otherwise prevented from reporting abuse until well into adulthood.[2]

SUMMARY OF ARG UMENT

As the Court appropriately recognized in addressing child sexual abuse: "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (quoting *New*

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[2] *Amici curiae* acknowledge the assistance of Thomas D. Lyon, J.D., Ph.D., Professor of Law, University of Southern California, in the preparation of this brief. Professor Lyon received assistance from Kathleen A. Kendall-Tackett, Ph.D., Mark J. Chaffin, Ph.D., Jodi A. Quas, Ph.D., Angela M. Crossman, Ph.D., and Sharon Portwood, J.D., Ph.D.

York v. Ferber, 458 U.S. 747, 756-57 (1982)). Accordingly, the Court has limited the constitutional rights of adults in numerous instances when necessary to prevent the sexual exploitation of children or to protect children victimized by sexual abuse. For example, the Court has upheld *per se* bans on child pornography, without any need to balance its potential merits, *Ferber*, 458 U.S. at 756-58; allowed courts to deny the press and public access to criminal trials when necessary to protect the well-being of child victims, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); and enforced restrictions on accused child molesters' rights to face-to-face confrontations at trial with their alleged child victims, *Maryland v. Craig*, 497 U.S. 836, 853 (1990).

The State of California furthered its compelling interest in protecting children by expanding the statute of limitations for certain child sexual abuse offenses involving "substantial sexual conduct," provided there is "independent evidence that clearly and convincingly corroborates the victim's allegation." Cal. Penal Code § 803(g)(2)(B) (West Supp. 2002). Because scientific and anecdotal evidence established it was not reasonable to expect victims of childhood sexual abuse promptly to report the crimes to law enforcement, California enacted Section 803(g) to ensure that these crimes do not go unpunished.

Amici submit this brief to demonstrate that the assumptions underlying Section 803(g) are supported by scientific evidence. For a variety of reasons discussed below, victims often are shamed, intimidated, or otherwise compelled to keep childhood sexual abuse a secret their whole lives. Although silent about their abuse, many victims continue to suffer from high rates of medical, psychological, and social problems throughout their adulthood. Those few who ever disclose the abuse frequently do so years after it has occurred, often in an effort to protect other children from the pedophile who abused them.

Amici also present empirical evidence demonstrating the risk to children if the California law is struck down. Unlike most violent criminals, child molesters remain at serious risk of reoffending throughout their lives. If Section 803(g) is invalidated, admitted and convicted sex offenders may be released from prison or escape prosecution altogether – denying victims the opportunity to hold their abusers accountable, exposing additional children to the risk of molestation, and reducing the likelihood that offenders will receive the psychological care they need.

ARGUMENT

I. CALIFORNIA'S STATUTE OF LIMITATIONS RECOGNIZES THAT VICTIMS OFTEN NEED ADDITIONAL TIME TO REPORT CHILDHOOD SEXUAL ABUSE.

Effective January 1, 1994, California Penal Code Section 803(g) extended the limitations period for certain sexual offenses to one year following a report to a law enforcement agency by a person of any age that he or she was the victim of sexual abuse while a minor. Cal. Penal Code § 803(g). The crime must have involved "substantial sexual conduct," and there must be "independent evidence that clearly and convincingly corroborates the victim's allegation." *Id.* § 803(g)(2)(B). "Substantial sexual conduct" is defined as vaginal or rectal penetration by a penis or foreign object, oral copulation, or mutual masturbation. *Id.* (incorporating, in part, the definition of "substantial sexual conduct" from Cal. Penal Code § 1203.066(b)). The independent corroborating evidence required by the statute must be admissible at trial and "does not include the opinions of mental health professionals." *Id.*

A. The California Legislature Determined Section 803(g) Was Needed Because Victims of Childhood Sexual Abuse Often Delay Reporting the Abuse.

Summarizing the impetus behind Section 803(g), California courts have explained:

> Section 803(g) was obviously designed to preclude child molesters from escaping punishment merely because the molestation was revealed after the victim became an adult and after the limitations period had elapsed. Certainly the Legislature was aware that children who are the victims of sex crimes often cannot recognize or effectively assert their victimization until they have reached adulthood. Moreover, victims of sex crimes may be more likely to delay reporting because they are afraid of reprisals or fearful that they will not be believed. The legislative purpose behind section 803(g) was to prevent sex offenders from reaping the benefits of their victim's immaturity and psychological trauma, and the legislative history plainly indicates that section 803(g) was intended to create an exception to the statutes of limitations.

Stogner v. Superior Court, 114 Cal. Rptr. 2d 37, 43-44 (Cal. Ct. App. 2001), *cert. granted sub nom. Stogner v. California*, 123 S. Ct. 658 (2002); *accord People v. Maguire*, 125 Cal. Rptr. 2d 556, 560 (Cal. Ct. App. 2002); *see also People v. Frazer*, 982 P.2d 180 (Cal. 1999) (upholding the constitutionality of the statute against *ex post facto* and due process challenges), *cert. denied*, 529 U.S. 1008 (2000).

The Report of the California Assembly's Committee on Public Safety endorsed this legislation because "[s]ex crimes committed against children are the most heinous of offenses. Unfortunately, many don't bring the crime to the attention [of] law enforcement until ma[n]y years later, when the statute of limitations has already expired." *Assemb.*

Comm. on Pub. Safety, Analysis of Assemb. Bill No. 2014, 1995-96 Reg. Sess. (Cal. 1996), at 1. The Report found a pressing need for the legislation because, under the prior statute of limitations, "[c]hildren become double victims—first victimized by the perpetrator and again by the judicial system. This measure will guarantee them their day in court." *Id.*

Indeed, numerous law enforcement organizations supported extending the statute of limitations "because in many instances sexual abuse crimes are not reported by the victim because of fear of the abuser, shame to her or himself, etc." Letter from Legislative Oversight Committee (the California Peace Officers' Association, California Police Chiefs' Association, and California State Sheriffs' Association) to Rep. Boland of 2/10/93, at 1.

The California legislature also heard from many adults who explained why they did not report sexual abuse that occurred during their childhood. In the 1991 hearings leading up to the ultimate passage of California's extended statute of limitations, one victim explained: "You see, I was scared and very protective, protective of the love that my parents had for me. If I had told the bad things that my uncle and I had done, my parents would not love me anymore. That's what I thought at the time." *The Criminal Statute of Limitations for Child Sexual Abuse Offenses: Interim Hearing Before the Assemb. Comm. on Pub. Safety*, 1991-92 Reg. Sess. 7 (tape 1A) (Cal. 1991) [hereinafter Public Safety Hearing] (statement of Ms. Hall). Another victim explained that it was not until she had reached adulthood and left her abusive home that she realized the toll the abuse had taken on her:

> I told myself it didn't affect me. He had been gentle, it was not violent, I was still a virgin so I told myself it didn't affect me. It did affect me. I am traumatized to

> this day by sexual abuse . . . . [B]ut it took me 10 more years before I could recognize how that abuse was impacting my life.

Id. at 9 (tape 1A) (statement of Ms. Fuller).

Additional witnesses testified that they did not come forward until they learned that others were being subjected to the same abuse. One witness explained, "[a] fragile young mind is too steeped with guilt to do anything and it is not until adulthood that people can get angry and feel willing and want to stop these people." *Id.* at 13 (statement of Ms. Ballinger). She testified, "[t]he reason that I feel that I had to come forward now is because I have found that my father is still molesting children. Three of my nieces have been molested. They range in age from 5 to 7." *Id.*

B. The California Legislature Determined Section 803(g) Was Needed Because Child Molesters Went Free Under the Prior Statute of Limitations.

Confirming what victims told legislators, law enforcement officials testified before the California legislature that the prosecution of child sex offenders was being thwarted by the previous statute of limitations. Law enforcement officials, representing approximately 25,000 California police officers, provided compelling testimony concerning the number of prosecutions that were being barred solely by the statute of limitations. One officer explained that in the twenty months preceding his testimony, the Los Angeles County Sheriff's Department had investigated and concluded that it could not prosecute sixty-eight reported cases of sexual abuse solely due to the statute of limitations. Public Safety Hearing at 1 (tape 3B) (statement of Mr. Lowman). Even where the evidence was overwhelming, he explained, the statute of limitations was barring prosecutions. For example, "[a]pproximately 90 percent of the victims depicted in

> [child pornography] cases that we investigate are currently adults making the crime out of statute." *Id.*

Mr. Lowman illustrated several other instances of time-barred claims. He explained that one thirty-seven-year-old woman reported being molested by her father from the age of five through seventeen, that her allegations were corroborated by her siblings, and that her father tacitly admitted his guilt to law enforcement. *Id.* at 1-2. Nevertheless, the father could not be prosecuted because of the statute of limitations. *Id.*

In a different case, the journal of a fifty-six-year-old man, entitled *My Erotic Experiences with Beautiful Little Girls*, was discovered. It graphically described his more than twenty-year child molestation spree. Based on the descriptions in the journal, law enforcement identified nine victims who described incidents of abuse that were "strikingly similar" to those in the journal. But because only one of the minors was abused within the limitations period, the perpetrator was sentenced to a mere sixteen months in prison. *Id.* at 3.

In 1996, the California legislature was provided additional examples of accused pedophiles having charges against them dismissed as a result of the statute of limitations. In one case, thirty-eight felony charges reportedly were dismissed against a man who allegedly engaged in hundreds of acts of sodomy and oral copulation with more then seventeen child victims. Letter from Legislative Coalition to Prevent Child Abuse to Sen. Marks of 6/4/96, at 1. Another man who allegedly victimized more than twenty-six children (including victims as young as nine months old) evaded prosecution for most of these offenses because of the statute of limitations. *Id.*

Victims also came forward in support of the bill with strong evidence to support their claims. One of these victims obtained a taped confession from a minister who admitted

sexually abusing him and others at choral camp, church, and other locations. That victim obtained a civil judgment against his abuser, but was denied criminal relief under the prior law. Although a criminal case apparently was brought against this alleged abuser, that action was dismissed due to the statute of limitations. Letter from Ross E. Cheit to Sen. Marks of 6/10/96, at 1. In objecting to this disparity, the victim's brother (who was his lawyer in the civil case against the child molester) advised California legislators that "[i]t is a cruel irony that that very same innocence can legally deprive the victims of the ability to understand the crimes committed against them until it is too late to prosecute their assailants." Letter from David A. Cheit to Sen. Marks of 5/22/96, at 1.

Plainly, the evidence considered by the California legislature highlighted a very disturbing and all too real problem. That evidence is confirmed by numerous well-designed scientific studies.

II. THE PURPOSES UNDERLYING CALIFORNIA'S STATUTE OF LIMITATIONS ARE SUPPORTED BY NUMEROUS SCIENTIFIC STUDIES.

Most child molesters will escape prosecution with or without the extended statute of limitations of Section 803(g). That is because most children victimized by sexual violence will never report those crimes to law enforcement. For those few who report the crimes, it often takes years before they are ready to discuss the traumatic events and confront their abusers. Regardless of whether they report the crimes, childhood sexual abuse victims often suffer from physical and psychological problems throughout their lives. At the same time, perpetrators often remain at risk for reoffending throughout their lives. Although Section 803(g) cannot completely prevent offenders from reaping the benefits of their victim's immaturity and the psychological trauma they inflict upon

them, it does provide redress for those victims who find the courage to report the crimes.

A. Childhood Sexual Abuse Is Rarely Reported.

Most childhood sexual abuse is never reported. Only 12% of the child sexual assaults in a nationally representative survey of 4,008 American women were ever reported to authorities. Rochelle F. Hanson et al., *Factors Related to the Reporting of Childhood Rape*, 23 Child Abuse & Neglect 559, 564 (1999) [hereinafter Hanson et al. 1999]. All of the incidents consisted of substantial sexual conduct between the molester and the victim: sexual assault was defined in that study as nonconsensual sexual penetration of the victim's vagina, anus, or mouth by a perpetrator's penis, finger, tongue, or an object, that involved the use of force, or the threat of force or coercion. *Id.* at 562. This low rate of reporting is similar to that found in earlier studies of the general population. Christopher Bagley & Richard Ramsay, *Sexual Abuse in Childhood: Psychosocial Outcomes and Implications for Social Work Practice*, 4 J. Soc. Work & Hum. Sexuality 33, 37 (1986) (finding that, in a community sample of women where abuse is defined as manual or more serious assault on a girl's genital area with direct force, threat of force, or where the perpetrator is more than three years older, 98% of abuse is never reported to police or child protection services); Paul E. Mullen et al., *Childhood Sexual Abuse and Mental Health in Adult Life*, 163 British J. Psychiatry 721, 729 (1993) (finding 92% of abuse not reported to any form of authority or social agency).

One reason few cases of sexual abuse are reported to law enforcement is that large percentages of victims never disclose the abuse to anyone. Another national survey (using the same methodology as Hanson et al. 1999) questioned 3,220 American women, and found that 28% of women who had been sexually assaulted as children had never told *anyone*

about the assault prior to the survey, "not mothers, best friends, or husbands." Daniel W. Smith et al., *Delay in Disclosure of Childhood Rape: Results from a National Survey*, 24 Child Abuse & Neglect 273, 283 (2000). These women had kept their abuse a secret for an average of over twenty-five years. *Id.* at 277-81. Among all women who disclosed their abuse, nearly half waited more than eight years to do so. *Id.* at 279-80.

Other surveys find similarly high rates of secrecy, and men are just as likely as women—if not more likely—to keep childhood sexual assault a secret. *See, e.g.*, David Finkelhor et al., *Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors*, 14 Child Abuse & Neglect 19, 21 (1990) (finding 33% of victimized women and 42% of victimized men had never disclosed childhood sexual abuse); *see* Thomas D. Lyon, *Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation*, *in* Critical Issues in Child Sexual Abuse 116-17 (J.R. Conte ed., 2002); Mary L. Paine & David J. Hansen, *Factors Influencing Children to Self-Disclose Sexual Abuse*, 22 Clinical Psychol. Rev. 271, 274-75 (2002). Moreover, surveys underestimate long-term secrecy because many abuse victims who have not disclosed abuse to loved ones also fail to disclose to a surveyor. *See* David M. Fergusson et al., *The Stability of Child Abuse Reports: A Longitudinal Study of the Reporting Behaviour of Young Adults*, 30 Psychol. Med. 529, 531 (2000).

Unfortunately, even when children muster the courage to tell trusted adults about sexual abuse, or adults otherwise learn of the abuse, the adults often fail to report the offenses to law enforcement. Bagley & Ramsay, *supra*, at 37 (finding 75% of disclosures to adults did not result in reports to authorities). For instance, mothers hearing their children's complaints of sexual abuse often feel ambivalent about contacting authorities; they often feel inadequate, they may doubt the child, and they may fear or distrust the police and

social services. They also may feel pressure from family members, friends, and the abuser to keep the abuse a secret. Allan R. De Jong, *Maternal Responses to the Sexual Abuse of Their Children*, 81 Pediatrics 14, 18 (1988).

B. There Are Numerous Reasons Victims Do Not Report Childhood Sexual Abuse.

The reasons victims delay reporting childhood sexual abuse to authorities, if they report the abuse at all, are numerous: (1) offenders often threaten their victims to remain silent, including threatening to harm or kill the victims or their loved ones; (2) children may not appreciate the wrongfulness of the conduct, particularly when victimized by a trusted adult; (3) victims often are ashamed of what has transpired; and (4) victims often fear that they will not be believed, and are afraid of the consequence of disclosing the abuse. These factors are not exclusive and, in many cases, a combination of factors will influence the victim's decision not to reveal the abuse.[3]

Threats. Threats of violent reprisals against a child or the child's loved ones often are used by child molesters to intimidate their victims into silence. Of the 88% of childhood

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[3] The studies on delays in reporting discussed in this brief rarely mention delays due to forgetting and subsequent recovery of memory through therapy. This is not surprising, given that only a very small percentage of adults who report childhood sexual abuse report remembering the abuse with the help of a therapist or professional. Sharon Wilsnack et al., *Self-Reports of Forgetting and Remembering Childhood Sexual Abuse in a Nationally Representative Sample of US Women*, 26 Child Abuse & Neglect 139, 144 (2002) (finding 1.8% of national probability sample of women reported remembering abuse with help of therapist). At any rate, the requirement of independent corroborative evidence in Section 803(g) minimizes the likelihood that false memories would form the basis for prosecution. *Amici* are not addressing the issues of "induced false memory" or "recovered memory," about which there is no consensus in the literature.

sexual abuse incidents that were never reported in the Hanson study, almost half involved threats to the child's life (43%), almost half involved a series of assaults (42%), and over a fifth involved physical injury (22%). Hanson et al. 1999, *supra*, at 565 (Table 2). Once the abusive relationship is underway, perpetrators often warn or threaten the child not to reveal it. One nationwide survey of 954 criminal cases of childhood sexual abuse discussed the array of warnings used by child molesters:

> [W]arnings ranged from pleas that the abuser would get into trouble if the child told (or that the abuser would be sent away and the child would never see them again—a powerful message to a young child whose abuser is also a "beloved" parent), to threats that the child would be blamed for the abuse (especially troubling were children who were told that the defendant's intimate—the child's mother—would blame the child for "having sex" with the defendant and would thus turn against him or her), to ominous warnings that the defendant would hurt or kill the child (or someone he or she loved) if they revealed the abuse.

Barbara Smith & Sharon G. Elstein, Submission of Am. Bar Ass'n Fund for Justice and Educ. to Nat'l Ctr. on Child Abuse and Neglect, *The Prosecution of Child Sexual and Physical Abuse Cases: Final Report* 93, 122 (1993); *see also* Louise D. Sas & Alison H. Cunningham, Submission of London Fam. Ct. Clinic Inc. to Fam. Violence Prevention Div. Health Can., *Tipping the Balance to Tell the Secret: Public Discovery of Child Sexual Abuse* 1, 91-92 (1995) (reporting threats to hurt the child or a third-party, harm the mother emotionally, withdraw privileges, and warnings that the abuser would be harmed by the disclosure or that the child no longer would be loved by his or her mother).

Even without express warnings, children often intuit the dangers of disclosure. Sas and Cunningham's sample of 524 children whose sexual abuse was prosecuted in criminal court

found "overt threats were not necessary if the man had a history of violence within the home." Sas & Cunningham, *supra*, at 122. As one child responded when asked if the perpetrator had threatened her not to tell, "No, but I knew what he was capable of." *Id.*

Abuse of Trust. Childhood sexual abuse victims often do not confide in family and friends because abuse often is perpetrated by family and friends. Sexual abusers typically exploit a trusting relationship, either one that is born of family relationships and living arrangements, or one they create through their encounters with the child and his or her family. Michele Elliott et al., *Child Sexual Abuse Prevention: What Offenders Tell Us*, 19 Child Abuse & Neglect 579 (1995).

In the survey by Smith et al., only 10% of the childhood sexual assaults were by strangers, and stranger rapes were more likely to be disclosed. Smith et al., *supra*, at 278, 281. Child victims almost always knew their assailant: relatives made up about half of the perpetrators, and friends and acquaintances the other half. *Id.* at 278. Given their trust in their abusers, children often do not initially recognize that sexual abuse is wrong. Sas & Cunningham, *supra*, at 90. Indeed, this Court has recognized: "A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

Shame. Another enduring disincentive for disclosure is shame and embarrassment. Often, a child's initial compliance with the sexual demands of a trusted adult leads him or her to feel responsible for the abuse, making it more difficult to disclose as the abuse increases in frequency and severity. Paine & Hansen, *supra*, at 281. Children can thus become trapped in abusive relationships. Boys suffer from additional barriers to disclosure, including socialization to conceal their vulnerabilities and the stigmatization of being abused by men. Juliette D. G. Goldman & Usha K.

Padayachi, *Some Methodological Problems in Estimating Incidence and Prevalence in Child Sexual Abuse Research*, 37 J. Sex Res. 305 (2000); Paine & Hansen, *supra*, at 275.

Self-blame may last into adulthood. In one survey, self-blame led some victims to "feel too ashamed or guilty" to disclose. Diana E. H. Russell, *The Secret Trauma: Incest in the Lives of Girls and Women* 132 (1986); *see also* Sally E. Palmer et al., *Responding to Children's Disclosure of Familial Abuse: What Survivors Tell Us*, 78 Child Welfare 259, 269 (1999) (finding that over half of victims attributed failure to disclose abuse during childhood to the belief that they deserved the abuse). Another team of researchers asked women who had been sexually abused to describe their most distressing experiences; women who disclosed abuse exhibited more disgust, whereas women who failed to disclose abuse exhibited more shame. George A. Bonanno et al., *When the Face Reveals What Words Do Not: Facial Expressions of Emotion, Smiling, and the Willingness to Disclose Childhood Sexual Abuse*, 83 J. Personality & Soc. Psychol. 94, 100-01 (2002).

Fear. When adults are questioned about their failure to disclose childhood sexual abuse, the most commonly mentioned motivator is fear: fear for themselves, fear for loved ones, and fear for the perpetrator. In Russell's survey of 930 adult women, forty-four women who disclosed abuse for the first time described fear of punishment by the perpetrator, a desire to protect the perpetrator, fear of abandonment and rejection, and fear of being blamed or not being believed. Russell, *supra*, at 132; *see also* Palmer et al., *supra*, at 269 (describing convenience sample of adults who had not disclosed sexual, physical and/or emotional abuse who mentioned "fear of the abuser (85%), fear of negative reactions from other family members (80%), fear that no one would believe them (72%)"). These fears also are expressed by children who manage to disclose, but only after long

delays. In Sauzier's review of 156 initially silent sexual abuse victims, they "described the fear of losing the affection and goodwill of the offender; fear of the consequences of telling (being blamed or punished for the abuse by the non-offending parent); fear of being harmed; and fear of retaliation against someone in their family." Maria Sauzier, *Disclosure of Child Sexual Abuse: For Better or for Worse*, 12 Psychiatric Clinics of N. Am. 455, 460 (1989).

Perhaps nothing captures victims' reasons for not coming forward as well as their own words. Victims have described their initial failure to realize that the abuse was wrong, *see* Sas & Cunningham, *supra*, at 134 ("He said only people who really love each other do that stuff"), and their resulting feelings of shame and self-blame, *see id.* at 130 ("I thought maybe I did something that made him want to do it"); Palmer et al., *supra*, at 271 ("I didn't want people to know the kind of family I had—I thought it made me look bad," "I didn't want anyone to know that I'd let somebody do that"). Victims also have described their fears of the abuser, *see* Palmer et al., *supra*, at 270 ("I believed that my abuser was so powerful that nobody could stop him—he was indestructible," "If I told or 'got' a baby, he would kill me and bury me under a tree"), and their fear that the abuser would hurt others, *see* Sas & Cunningham, *supra*, at 122 ("My little sister and I are close and he said, 'If you tell, I'll go after your little sister'"). Finally, victims have described their fears of their families' reaction, *see* Palmer et al., *supra*, at 270 ("My mother would hate me—I wouldn't have a family any more"), their fears of not being believed, *see id.* at 271 ("I thought no one would believe me—they would think I was crazy"); Sas & Cunningham, *supra*, at 127 ("I would be in a lot of trouble if the police had decided not to believe me—my entire family would have turned against me"), and their fears of being forced to leave their homes, *see id.* ("I was scared that someone would take me away from my brother and sister").

C. The Devastating Effects of Childhood Sexual Abuse Often Last Well Into Adulthood.

Prosecuting sex crimes committed against children years after they occur is justified because the harms of childhood sexual abuse do not end with childhood. Sexually abused children typically suffer from higher rates of serious medical, psychological, and social problems during adulthood than adults who were not abused as children. One of the most recent studies on the long-term effects of childhood sexual abuse cites a number of population studies demonstrating that child sexual abuse is related to higher rates of attempted suicide, mental disorders (including anxiety disorders, depression, alcohol abuse, drug abuse, eating disorders, conduct disorder, and borderline personality disorder), sexual revictimization, and relationship problems, including divorce. Elliot C. Nelson et al., *Association Between Self-Reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes: Results from a Twin Study*, 59 Archives Gen. Psychiatry 139 (2002).

The research on the effects of childhood sexual abuse has grown more sophisticated with time. In the past decade, a number of methodologically rigorous studies have provided convincing evidence of a link between childhood sexual abuse and adult suffering. These studies examine large numbers of people, which increases the statistical power of the research. The studies draw participants from the general population, making the findings generalizable to the population at large. Finally, the studies control for possible alternative explanations for why sexually abused children might experience problems in adulthood, such as other disruptions in the family.

Molnar et al. conducted the first study examining the relationship between sexual abuse and a variety of psychological problems in a nationally representative sample of almost 6,000 Americans, aged fifteen to fifty-four. Beth E. Molnar et al., *Child Sexual Abuse and Subsequent Psychopathology: Results from the National Comorbidity Survey*, 91 Am. J. Pub. Health 753, 753 (2001). The authors acquired information about sexual abuse and about nineteen other "childhood adversities," including parental mental disorders and family violence. "After such potential confounders were adjusted for, there was still a strong, independent, statistically significant relationship between [childhood sexual abuse] and the majority of mood, anxiety, and substance disorders." *Id.* at 757. Sexual abuse victims were more than twice as likely as those without a history of sexual abuse to suffer from one or more mental disorders. *Id.* at 755 (Table 2).

In a separate study, with the same subjects and similar controls for childhood adversities, Molnar et al. found that women who had been raped as children were almost four times more likely than non-victims to make a serious attempt to commit suicide. Beth E. Molnar et al., *Psychopathology, Childhood Sexual Abuse and Other Childhood Adversities: Relative Links to Subsequent Suicidal Behaviour in the US*, 31 Psychol. Med. 965, 972 (Table 3) (2001). Men who were raped as children were eleven times more likely to attempt suicide than non-victims. *Id.*

Kendler et al. analyzed reports from 1,411 women averaging over thirty-five years of age and found significant increases in major depression, generalized anxiety disorder, alcohol dependence, and drug dependence among those who had been sexually abused as children, even after controlling for family dysfunction and parental mental illness. Kenneth S. Kendler et al., *Childhood Sexual Abuse and Adult Psychiatric and Substance Use Disorders in Women: An Epidemiological and Cotwin Control Analysis*, 57 Archives Gen. Psychiatry 953, 957 (Table 5) (2000). For the most seriously abused group—those for whom abuse included sexual intercourse—victims were almost five times as likely as nonvictims to suffer from multiple disorders. *Id.*

Similarly, Fleming et al. examined the reports of 710 women with respect to a large number of potentially negative outcomes from sexual abuse, including mental health problems, psychiatric symptoms, domestic violence, and sexual problems. Jillian Fleming et al., *The Long-Term Impact of Childhood Sexual Abuse in Australian Women*, 23 Child Abuse & Neglect 145, 147 (1999). They found that even after controlling for family dysfunction, women who had been sexually abused as children were more than twice as likely as those not abused to suffer from one or more adverse outcomes. *Id.* at 155 (Table 4). "The results of this study along with other research indicate that the associations between [childhood sexual abuse] and adult difficulties persist even after the potentially confounding childhood family and social factors are controlled for." *Id.* at 156.

Fergusson et al. surveyed 1,019 eighteen-year-old men and women and found statistically significant increases in psychiatric disorders related to sexual abuse, even "after adjustment for potentially confounding childhood and family factors." David M. Fergusson et al., *Childhood Sexual Abuse and Psychiatric Disorder in Young Adulthood: II. Psychiatric Outcomes of Childhood Sexual Abuse*, 34 J. Am. Acad. Child & Adolescent Psychiatry 1365, 1369 (1996) [hereinafter Fergusson et al. 1996]. The disorders included major depression, anxiety disorder, conduct disorder, alcohol dependence, substance abuse, and suicide attempts. *Id.* The authors estimated that eliminating sexual abuse would reduce the prevalence of these psychiatric disorders by 9% to 20%. *Id.* at 1373.

Mullen et al. compared 248 women who had been sexually abused as children to 244 women who had not been abused. Mullen et al., *supra*, at 722. After controlling for family background, women in the abused group exhibited statistically significant increased levels of mental illness, chronic ill-health, eating disorders, suicidal behavior, and inpatient psychiatric care. The increase in risks ranged from a

doubling of risk for chronic ill-health to a ten-fold increase in suicidal behavior. *Id.* at 726 (Table 2).

A particularly impressive method for assessing the potential effects of sexual abuse on long-term adjustment is by analyzing twin-pairs who are "discordant" for sexual abuse; that is, one twin has been sexually abused and the other has not. Twins share the same family background, experience similar events at the same developmental stages, and are genetically similar. If an abused twin exhibits more problems as an adult than a non-abused twin, this constitutes compelling evidence that abuse is the cause of the problems. Of course, a problem with twin studies is that it is difficult to identify large numbers of twins, let alone twins discordant for sexual abuse. Recently, however, Nelson et al. identified 283 same-sex adult twins who were discordant for child sexual abuse and who were raised in the same home. Nelson et al., *supra*, at 144 (Table 4). The findings were compelling: "In this large twin study, we found that individuals reporting a history of [childhood sexual abuse] had increased risk for subsequently occurring adverse outcomes of depression, suicide attempt, conduct disorder, alcohol and/or nicotine dependence, social anxiety, rape after the age of 18 years old, and divorce." *Id.* at 142.

Discussing the relevance of family background factors, the authors concluded that the data "provide strong evidence that [childhood sexual abuse] is associated with substantial risk not explained by these factors." *Id.* Compared to their non-abused twins, abused twins faced a 50% increase in the likelihood of major depression and alcohol dependence, were more than twice as likely to attempt suicide, and more than seven times as likely to experience divorce. *Id.* at 144 (Table 4).[4]

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[4] The elevated rates in this study are similar to those found in two previous twin-pair studies with smaller samples. *See* Stephen H. Din-

These studies clearly document long-term physical, psychological, and social harms suffered by adults who were sexually abused as children. The research demonstrates that the harms experienced by childhood sexual abuse victims cannot be attributed to other childhood adversities. At least four studies have found that effects were most serious when abuse was more severe. *See* Fergusson et al. 1996, *supra*, at 1373; Kendler et al., *supra*, at 953; Mullen et al., *supra*, at 726; Nelson et al., *supra*, at 143. Hence, a statute like California's, requiring "substantial sexual conduct," is one that targets the type of abuse most likely to cause the most serious and long-lasting harm.

This research examines individuals drawn from the population at large, avoiding difficulties in generalizing results from psychotherapy patients or college students. Clinical samples may disproportionately identify persons suffering the most from sexual abuse, Fleming et al., *supra*, at 146, and college samples may disproportionately identify persons suffering the least, Renae D. Duncan, *Childhood Maltreatment and College Drop-Out Rates: Implications for Child Abuse Researchers*, 15 J. Interpersonal Violence 987, 993 (2000). Nevertheless, research examining both samples have some value: clinical samples show that "some persons are harmed, and severely so" by child sexual abuse, whereas college samples suggest that some students apparently are able to withstand sexual abuse and emerge in good health. Bruce Rind et al., *The Validity and Appropriateness of Methods, Analyses, and Conclusions in Rind et al. (1998): A Rebuttal of Victimological Critique from Ondersma et al. (2001) and*

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widdie et al., *Early Sexual Abuse and Lifetime Psychopathology: A Co-Twin-Control Study*, 30 Psychol. Med. 41, 45-47 (2000); Kendler et al., *supra*, at 953. The elevated rates of harm found in those studies were not usually statistically significant. The authors of those studies emphasized that because of their limited sample sizes their statistical power to detect real differences was limited. Dinwiddie et al., *supra*, at 43; Kendler et al., *supra*, at 958.

Dallam et al. (2001), 127 Psychol. Bull. 734, 734 (2001). In a legal context, any harm is significant, particularly because those who seek legal intervention are those most likely to have suffered harm. The population studies establish that sexual abuse is associated with long-term harms and constitutes a serious public health concern. The research justifies California's efforts to redress the harms of childhood sexual abuse, regardless of when that abuse occurred.

D. Child Molesters Often Remain A Threat To Children Throughout Their Lives.

Prosecuting sex crimes committed against children years after they occur is justified because child molesters often are repeat offenders. Section 803(g) already has resulted in hundreds of convictions and guilty pleas in child sexual abuse cases. It is safe to assume that their incarceration has prevented additional children from being abused.

Perpetrators of child sexual abuse remain at risk of reoffending long after the abuse occurs. "Inducing a child to have sex does not depend on any overwhelming physical or sexual prowess but rather on verbal manipulation—an ability that, of course, does not recede with normal aging." Robert Dickey et al., *Age as a Differential Characteristic of Rapists, Pedophiles, and Sexual Sadists*, 28 J. Sex & Marital Therapy 211, 213 (2002).

Unlike most violent offenders, child molesters do not "age out" of criminality. Hanson analyzed data from 4,673 sexual offenders and found that the "recidivism rate of the extrafamilial child molesters showed relatively little decline until after age 50." R. Karl Hanson, *Recidivism and Age: Follow-Up Data from 4,673 Sexual Offenders*, 17 J. Interpersonal Violence 1046, 1054 (2002). Although research suggests that approximately 13% of child molesters are convicted of a subsequent sex offense, most studies track molesters for only four to five years. R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender*

Recidivism Studies, 66 J. Consulting & Clinical Psychol. 348, 351 (1998).

Studies with longer follow-up periods find substantially higher rates of recidivism, and reaffirm the fact that molesters pose long-term risks for reoffending. A study by Hanson et al. tracked 197 convicted child molesters, most of them for more than fifteen years, and found that 42% were convicted of a subsequent sexual and/or violent offense. R. Karl Hanson et al., *Long-Term Recidivism of Child Molesters*, 61 J. Consulting & Clinical Psychol. 646, 648 (1993) [hereinafter Hanson et al. 1993]. The offenders' ages were unrelated to their risk of recidivism, leading the authors to conclude that "child molesters appear to be at significant risk for reoffending throughout their life." *Id.* at 650. Prentky et al. tracked 115 convicted child molesters and calculated a recidivism rate of 41% within twenty-five years of release from prison. Robert A. Prentky et al., *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 L. & Hum. Behav. 635, 644 (1997). The researchers noted that child molesters showed smaller decreases in reoffending with advancing age than offenders who rape adults, and concluded that "child molesters are at risk to reoffend sexually throughout their lives." *Id.* at 652.

The recidivism rates calculated by these studies are conservative. As noted, many sex crimes committed against children are never detected. Hanson et al. 1993, *supra*, at 650; *see also* Gene G. Abel et al., *Self-Reported Sex-Crimes of Non-Incarcerated Paraphiliacs*, 2 J. Interpersonal Violence 3, 25 (1987). Conviction rates routinely are lower than arrest rates, which may more accurately reflect sexual reoffending. Prentky et al., *supra*, at 636. Whatever the rates of reoffending, the research demonstrates that even sexual offenses against children that occurred long ago evince a continuing risk of recidivism by the offender.

A ruling adverse to the State of California could jeopardize hundreds of convictions of child sex offenders that have been obtained in the nearly nine years since Section 803(g) became effective, and jeopardize countless future prosecutions when other victims ultimately come forward. In the event this Court strikes down Section 803(g), defense counsel are expected to seek the release of these convicted sex offenders through writs of *habeas corpus* and *coram nobis*.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to conclude that the assumptions underlying the State of California's extension of the statute of limitations for childhood sexual abuse offenses are supported by scientific evidence.

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